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Kent Centennial Celebration at Columbia Law School

THE retirement of James Kent from the Chancellorship of New York and his return to Columbia as Professor of Law in 1823, marking the beginning of those lectures that culminated in the famous Commentaries on American Law, was taken as the occasion of the Kent Centennial Celebration at Columbia University on the evening of June 4th of this year. This was one of a series of nation-wide events in recognition of Kent's contributions to the science of jurisprudence in this country that will mark the year 1923. The feature of the celebration at Columbia was the address of the Secretary of State, the Honorable Charles E. Hughes, class of 1884 Law.

The Centennial was opened by Bishop William T. Manning, who delivered the invocation. The Honorable Edward R. Finch, '98 Law, of the Appellate Division of the Supreme Court of New York, and President of the Alumni Association of the Law School, under the auspices of which the Celebration was held, made a brief speech introducing Secretary Hughes. Judge Finch took as his keynote, which was also the keynote of the Centennial, the quotation from the Commentaries at 1: 3, "States, or bodies politic, are to be considered as moral persons, having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals each of whom carries with him into the service of the community the same binding law of morality and religion which ought to control his conduct in private life." Judge Finch then indorsed the establishment of a permanent world court for the settlement of international disputes, saying in part, "Thus Kent created a doctrine to which public opinion may aspire in holding nations to account. Since nations often resort to war to attain wrongful ends, this doctrine of Kent's may yet become as potent in dissipating causes for war as Rousseau's conception that 'all men are born free and equal' has been in elevating mankind."

Hon. Charles E. Hughes then delivered an address, which will be found in another part of this issue.

Following the address a reception was tendered Secretary Hughes in Kent Hall, the building of the Law School, named for its famous professor. There were here exhibited a large collection of Kent's law books presented by Edwin C. Kent great-grandson of the Chancellor. Many of these books illustrate the life-long habit of Kent to annotate his books extensively. Manuscripts, pictures and other memorabilia connected with the life of Kent from his coming to Columbia in 1793 to his death in 1847 were also on exhibition. The Centennial was attended by ten descendants of the former Chancellor, representatives of the bench and bar, members of Congress, city officials, the faculty, alumni and students of the Law School and their friends.

Centralized Court Control at Cleveland, O.

DECIDED steps in the direction of greater efficiency in the administration of Justice are contained in the recent report of the Committee on Judiciary and Legal Reform of the Cleveland Bar Association. The committee reports that the Common Pleas Court Chief Justice Bill, drawn by it and providing for centralized control and attendant efficiency, has at last become a law. After providing for the designation of the first Chief Justice by the Common Pleas judges and the election of subsequent Chief Justices at the polls, the law proceeds to enumerate the powers that this official shall have. He is invested with general superintendence of the business of the court, shall classify

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and distribute it among the judges and fix the vacation of the judges, shall file an annual report showing the work performed by the court and each of the judges thereof. The judges of the court are to meet at least once a month and at such other times as the Chief Justice shall require, and to prescribe rules regulating the business of the court with a view of preventing delays and advancing Justice. Each Common Pleas judge at least once a month shall make a report in writing showing the duties performed by him, in such manner and form as the Chief Justice shall require.

The committee further reports that a bill drawn by it to provide for a thirteenth or alternate juror was also enacted into law. It is thought that "this provision for a thirteenth juror will avoid many mis-trials, save expense to taxpayers and to litigants, economize the time of attorneys and eliminate that uncertainty and anxiety which have always hitherto existed in important and lengthy trials arising from the ever-present possibility of the illness or the incapacity of a juror." The committee has also recommended to the Executive Committee of the Bar Association a plan to secure all the benefits arising from the appointment of a Public Defender without additional expense. The plan is for the Common Pleas judges to adopt a resolution to the effect that the members of the court sitting in the criminal branch in the cases authorized by certain code sections shall assign the defense a public defender designated by the Executive Committee of the Bar Association. The County Commissioners would then fix the fees as they do now, but the expense to the county would be no greater, and could be considerably less, than the $30,000 spent on an average for the past few years as fees to assigned counsel. Moreover, this service would be centralized in one official responsible to the Bar Association and the Common Pleas court as well, and there would no doubt be a much higher degree of efficiency in the performance of it. The committee further reports that in the problem of the consolidation of the courts difficulties are presented by possible constitutional restraint, "but we are of opinion that sooner or later by constitutional amendment or statutory amendment, or both, a way must be found to consolidate our courts, to make one body of judges, one set of clerks and officers, with the opportunity and duty of acting in co-ordination and co-operation under a supervising head, with appropriate departmental and jurisdictional subdivision."

Memorial to Chief Justice White

A MOVEMENT has been begun in the section of Louisiana in which the late Chief Justice Edward D. White was born to acquire and preserve as a memorial the dwelling in which he was born, along with a number of surrounding acres, which are to be ornamented and made into a park. The property in question is just five miles above Thibodaux in Lafourche Parish. The JOURNAL is indebted for this information to Mr. Francis L. Knobloch, a member of the American Bar Association, residing in Thibodaux, who adds, the following observations as to this interesting project: "The people of this section have resolved that they will mark his birthplace. It would seem that the movement is worthy of note, of mention in the official publication, and that endorsement on the part of the organization would come with fit and proper grace."

From a Lawyer to the Editors

IN his recent address before the American Society of Newspaper Editors, which met in New York, President John W. Davis of the Association put this very simple but illuminating question relative to the proposal to abridge or modify the power of the United States Supreme Court to declare an act of Congress unconstitutional: "I submit to you this simple question: If congress should pass a law forbidding the newspapers of this country to publish any comment whatever of an unfavorable or uncomplimentary character upon the speeches made on the floor of congress, under penal sanction, how many of the editors of the United States would ask to have the Supreme Court unanimous before they should declare such a law in violation of the Constitution? And if congress in passing that law had passed it by a bare majority of a single vote, how many would demand that there must be seven Supreme Court judges who disagree before an act of congress could be disapproved? Or if it had gone further and passed such a law in time of great personal passion, over the veto of the executive, how many would say that all the judges must concur before the act of the executive could be approved? We may with such propositions, my friends, preserve the form of constitutional government but the substance will be gone, for with government, as with religions, the form often outlives the substance of the faith."

International Legal Courtesies

PRESIDENT William Guthrie, of the New York Bar Association, was in Paris in April and had a very flattering reception by the bar of that city. M. Albert Salle, Batonnier of the Order of Parisian Advocates, the members of the Council of the organization, distinguished members of the judiciary, and many well known lawyers were present at the affair. Among the members of the council of the Order of Advocates who were presented was M. Raymond Poincaré, also president of the Council of Ministers. M. Salle greeted the distinguished guest in an address in which he recalled historic affinities which exist between the two countries. Mr. Guthrie replied fittingly and his remarks were interrupted on several occasions by the enthusiastic applause of the auditors. Le Matin, Echo de Paris, and other Parisian journals reported the proceedings at considerable length.

DEDICATION OF MEMORIAL TO CHIEF JUSTICE SALMON PORTLAND CHASE

American Bar Association Movement to Provide Suitable Monument for Grave of Distinguished Jurist Brought to Successful Conclusion by Ceremony at Spring Grove Cemetery, Cincinnati—Chief Justice Taft Reviews Life and Services of Predecessor—Large Gathering Witnesses Proceedings

SALMON P. CHASE, former Chief Justice of the United States Supreme Court, sleeps today beneath a monument fitly commemorative of a great character and a great life devoted to the public service. The solid block of granite, suitably inscribed and standing out against a beautiful background of green, seems to symbolize not only the enduring achievements of a life but also that eternity of grateful remembrance in which the profession of the law holds its members who have adorned it by their lives and works. In a day of hurry and preoccupation with affairs, the lawyers of the nation have found time through the American Bar Association and other associations, as well as individuals in cooperation, to accomplish this work of professional zeal and reverence. The fact that many years have passed since the Chief Justice was buried in Spring Grove Cemetery, Cincinnati, renders this dedication all the more significant and striking. It shows how surely the sense of the man's real greatness has persisted and confirmed itself in men's minds; how little the mere lapse of time avails to silence the echo of "the footsteps of majestic things."

The memorial unveiled May 30 with appropriate ceremonies in Spring Grove Cemetery, Cincinnati, in the presence of a large audience, brings to a successful conclusion the work of the special committee of the Association appointed by former President Cordenio A. Severance. The suggestion leading to the appointment of that committee was made during the Cincinnati meeting of the Association in 1921. Mr. Walter George Smith, of Philadelphia, former President, at that time called attention to the fact that the grave of the late Chief Justice was not marked. He and Mr. Andrew Squire discussed the matter and decided to bring it to the attention of the new President. Mr. Severance took it up with his customary promptness and appointed a committee composed of Senator Selden P. Spencer, Chairman, Andrew Squire and Guy W. Mallon. This committee held various meetings to select suitable plans for the monument and to raise the necessary funds. The details of their work so successfully accomplished may well form part of the permanent record of this undertaking, but cannot be given here.

Perfect weather helped make the unveiling a success from the ceremonial standpoint. Those in attendance included a majority of the members of the Ohio Supreme Court, the U. S. Circuit Court of Appeals, the U. S. District Courts of Ohio, and prominent members of the Bar of Ohio and adjoining states. Chief Justice William Howard Taft delivered the main address of the occasion, reviewing the life and services of Salmon P. Chase and drawing some inferences very applicable to the present time from the recital. Mr. Joseph Wilby, Chairman of the Cincinnati Bar Association Committee, presided. In opening the proceedings, he called on Dr. Frank Nelson, who delivered a beautiful invocation in which he prayed that the land might be blessed "with men and women who, like him, believe in liberty for others as for themselves, who are zealous for that self-controlled obedience to the law which alone can preserve our liberties." Mr. Wilby then announced that President John W. Davis, of the American Bar Association, who had been expected to deliver the presentation address was unable to be present on account of illness, and that Mr. Guy W. Mallon of the special committe of the Association would act in his place. Mr. Mallon said:

Presentation Address by Mr. Mallon

"Ladies and Gentlemen: The American Bar Association has fulfilled a neglected obligation long due to the memory of a great man. Salmon P. Chase held many posts of high honor in the governments of Ohio and of the United States, and rendered signal service to his state and to his country. For the greater part of the half century since his death his body has lain in this grave unmarked and almost unknown.

"As a statesman he was a leader among that staunch crew, who under the inspired Lincoln, 'Our Captain,' held the rudder true through storm and stress of civil war. As a lawyer he became Chief Justice of the United States at a time when clarity of vision and strength of purpose were demanded of those who would vindicate the majesty of the law and render equal justice to all.

"We, the lawyers of the United States, acting through our national group, The American Bar Association, have caused this monument to be erected upon his grave, to manifest our appreciation of his character and our gratitude for the life which one of our fellows gave in service to his nation; and this we do, with full realization that we can add nothing to his fame, by panegyric or by memorial. Two thousand four hundred years ago, Pericles said of the great men of Greece:

" 'Their glory is not graven only on stone over their earth, but lives on far away, without visible symbol, woven into the stuff of other men's lives.'

"Thus truly, as our civilization is founded upon law and justice. the virtue of the thoughts and acts of Salmon P. Chase brings daily sustenance to the life of every citizen of the United States.

"The American Bar Association is proud of its opportunity to take part in the presentation of this monument. But to whom shall it be presented? Not to the Cincinnati Bar Association, except in so far as that group, by the fortunate circumstance of location, may be privileged to exercise a loving care in the preservation of the beautiful stone. Not, indeed, to the lawyers of the United States,

for that would be a presentation to ourselves. We might present it to those for whom Salmon P. Chase labored, those who are and will be the chief beneficiaries of the genius and strength which he gave unsparingly, the on-coming generations of loyal American citizens.

"But why should we not be emboldened to adopt the beautiful thought of the Grecian orator whom I have named?

" 'This whole earth is the sepulchre of illustrious men. Nor is it the inscriptions on the columns in their native soil alone that show their merit, but the memorial of them, better than all inscriptions, in every foreign nation, deposited more durably in universal remembrance than on their own tombs.'

"The American Bar Association presents this memorial to the spirit of mankind."

Mr. Wilby then read a letter from Mrs. William S. Hoyt, the sole surviving daughter of Salmon P. Chase, addressed to the Committee of the American Bar Association and the Committee of the Cincinnati Bar Association, in which she conveyed her appreciation of this tribute to the memory of her father and expressed regret that her physical condition did not permit her to be present.

Mr. Frank F. Dinsmore, president of the Cincinnati Bar Association, then spoke as follows:

Mr. Dinsmore's Address

"Mr. President, Members of the Bar, Ladies and Gentlemen: To the American Bar Association I offer the thanks of the Cincinnati Bar Association for the erection of this beautiful memorial to the life and character of one who was a distinguished lawyer and citizen of our city. It is most appropriate that an organization of national extent and importance should be instrumental in preserving the memory and recalling the deeds of Salmon P. Chase. For his services were national in their scope and value and their effect has been felt in every part of our country.

"Furthermore, it is most appropriate that an organization of lawyers should remind us at this time of the life and works of this distinguished man. The great slavery issue which engaged his attention as a statesman has passed into history and is no longer of vital importance. But the necessity for the maintenance of constitutional government and for the due administration of justice according to law, which engaged his services as a lawyer and a judge, are vital subjects for our consideration and reflection. No one more than these lawyers can appreciate the fact that at the present time a spirit of unrest prevails, and that principles and institutions long regarded as stable and permanent are now questioned and doubted.

"The American Bar Association has not been unmindful of these tendencies in our national life, and has undertaken the task of explaining again to the American people the fundamental principles of American constitutional government, and the necessity for a clear understanding of those principles. If changes are to be made, they should be preceded by a clear appreciation of the value of the present forms of government, and a full discussion of any of the defects. Therefore, it seems to me it is not too much to say that there never was a time in the history of our nation when the duty of the lawyer to promote a clear understanding of American Constitutional government was more vital than at the present time.

"In the performance of this task these lawyers of the American Bar Association are qualified by education, observation and experience. But the inspiration which comes from the great characters of the past is helpful and sustaining, and the contemplation of the services of one who was Chief Justice of the United States will aid and support them in the discharge of these important duties.

"Under the influence of the spirit of Salmon P. Chase and in the presence of his great successor in the highest judicial office, this is a most appropriate occasion for a body of lawyers and of citizens generally, to acknowledge their indebtedness to the fundamental principles of American constitutional and representative government, to renew their devotion to those principles, and to determine that they shall be maintained in the present, and transmitted to the future, with undiminished vigor.

"It seems to me that these are some of the lessons that we should draw from the ceremonies of this day."

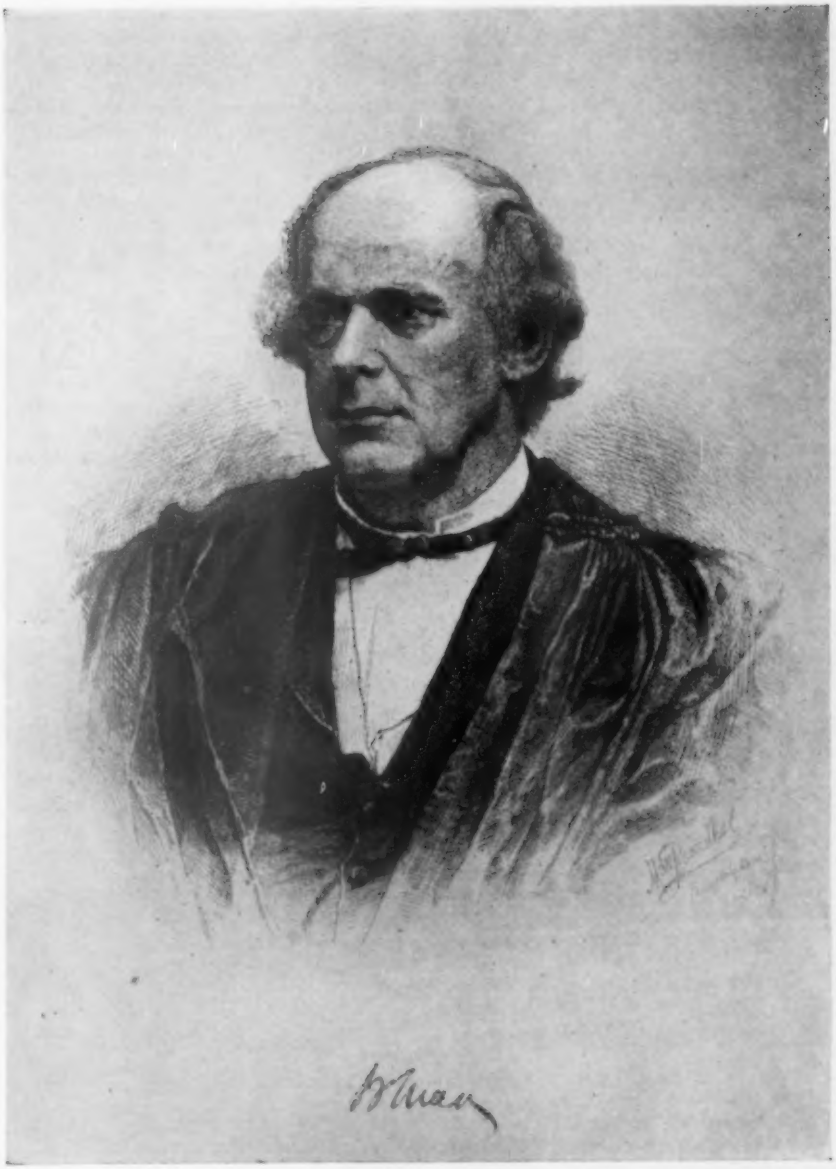
Chief Justice William Howard Taft then delivered the address dedicating the monument.

Address of Chief Justice Taft

THE American Bar Association performs an appropriate and pleasing duty thus to perpetuate the memory of Chief Justice Chase in the city of his professional life. American lawyers are widely distributed through forty-eight States and are separated by their practice into as many different systems of courts. The only Court in which they all stand on an equality, and in which not only the Constitution and laws of the Nation, but also those of all the States, are enforced, is the Supreme Court of the United States. In that Court they all should feel equally at home. It is the only Court in the country of which this can be said. They do well then, as a national profession, to preserve the name and confirm the greatness of a man who by his nine years' work as the head of that Court, left a deep and lasting mark upon our Federal constitutional law.

Salmon Portland Chase was born in the rugged hills of New Hampshire, in January, 1808. He was one year older than Lincoln. An uncle, a missionary Bishop of the Episcopal Church, brought him, when he was but twelve years old, to Ohio, where he spent three years at collegiate schools, one of them in Cincinnati. Returning to New Hampshire, he entered Dartmouth in the junior year, and took his Bachelor's degree in 1826, when he was but eighteen. He acquired his collegiate education by the hardest. He earned his way by teaching in the long vacations. Before he was twenty, he went to Washington and became the Master of a school. A year later he began the study of the law in the office of William Wirt, then Attorney General, and remained in Washington until he came to the Bar in 1830.

Chase's preparation for the Bar was defective, but he had the benefit of three years' sojourn in the Capital, where he saw and heard the great men of that day—Adams, Jackson, Webster, Clay, Wirt, Calhoun, and the great Chief Justice. His intense and life-



SALMON PORTLAND CHASE

Etching from Photograph in Carson's History of the Supreme Court of the United States. Reprinted by permission.

long interest in governmental matters and in constructive statesmanship received its primary impulse from these impressions and associations. In June, 1830, he settled down in this city and entered that disciplinary period in every lawyer's life when he is looking for business. In spite of his lack of application to the study of his profession in Washington, he had not lost his New England conscience, or his sense of responsibility for the use of his time. He read much. He organized a Lyceum and delivered four lectures himself. He helped to launch a periodical. His intellect was constantly active. He did what most young lawyers haven't the courage to do during his forced leisure. He devoted himself to hard professional work. He collated in useful form the statutes of Ohio, with annotations. It called forth the commendation of his grateful fellow members of the Bar, and of such authorities as Kent and Story. It included a history of the State. After its publication, he was able to make satisfactory professional partnerships, and for nearly twenty years he continued in the active practice of the commercial law.

Chase was a serious-minded man. He was sincerely religious. He had the moral force and persistence that prompted him to keep a journal, and this he did throughout his career. He has disclosed much of the inward workings of his heart. He revealed traits of which undue modesty was not one; but he showed his purpose to live a life of usefulness and high principle; and, more consistently than most, he pursued it.

In 1836 the interest which Mr. Chase always had had in public matters developed into a conviction and led him openly to espouse the cause of anti-slavery. He has been charged with often changing his party for personal advancement. That he was ambitious to secure opportunity for the wielding of governmental power, his dearest friend would not deny; but his stepping from one party to another did not indicate so much a change of principle on his part, as a change of principle by the shifting parties which he joined and left. He was an anti-slavery man first and a party man afterwards, and from time to time he sought the party he thought would help the cause. He said he was a Democrat. He said he was a state's rights man. His view was that the Constitution was an anti-slavery document, that it was adopted by those who deprecated slavery and intended to keep it within the slave states, and hoped that it might there die out. The cause he had at heart was to keep it where it was. His anti-slavery propaganda before the Civil War never went beyond this.

It is hard, at this distance of time, to follow the politics of Ohio from 1840 to 1860, because of the shifting and disintegrating of parties. It is difficult to understand how Chase, with his avowed anti-slavery sentiments, could be elected to the Senate by the Democrats against the Whigs in 1849, be twice elected Governor of that State after his Senate term ended, and then become Senator again in 1860; but so it was. If one would wish to vindicate his pursuit of principle in politics, one need but point to the ostracism and opprobrium that he had to undergo as an active anti-slavery man. Neither in the Senate nor in his executive office did he hesitate or falter in his consistent course. As much as any man in the country, did he contribute to the formation of the Republican party.

Mr. Chase was not a facile speaker. He had little or no sense of humor. He could not entertain crowds, but he struggled to convince his audience. He had the earnestness of conviction, the seriousness of a high purpose, great reasoning faculties, and the courage and sacrifice of careful preparation. He was a man of large physique, dignified bearing and impressive presence. He was a man of culture, one who was practiced in exact, graceful and forcible expression. He always wrote the platforms and the resolutions of the conventions and meetings organized to promote the great cause. There was nothing indolent about him. His correspondence was large, and his willingness to discuss plans for public betterment was constant.

Mr. Chase's temperament was masterful and his desire to take charge of anything in which he was interested was evident. He knew his powers, he understood the value of his experience, and he had the constructive impulse that made him anxious to apply all these in furtherance of his cause. Apparently he did not make friends of his contemporaries and his equals in point of ability and experience. He gathered about him able young men whose subsequent successes demonstrated his judgment in their selection, but he demanded of them complete devotion to the cause which he had embraced and a subordination to his own views and purposes which made some of them restive.

One can not say that his political judgment was bad except as to his own popular strength. Though a candidate for the Presidency in 1860, in 1864, in 1868, and in 1872, his estimates of his strength generally proved to be much mistaken.

When Chase came into Lincoln's Cabinet, he shared with Seward that underestimate of Lincoln which led them both into error. Lincoln had but little knowledge of the finances of the country and he gave to Chase free scope in the Treasury. This extended to the matter of appointments, which Chase cherished and used for his friends. On the other hand, Chase did not confine his attention to his own jurisdiction. His confidence in his own judgment and what he could do if he had power in other departments prompted him to ill-concealed criticism of the rest of the Administration. He was not disloyal, but he was not a good subordinate. He was a natural leader and his urge for leadership made him a critic of the leadership of others. Mr. Lincoln knew his defects in this regard, but knew also, and valued, his great ability and conscientious devotion to service. His plans for the improvement of the finances of the Government were more useful and effective than Congress ever gave him the opportunity to carry out. He underestimated the capacity and willingness of the people, if required, to respond to heavy taxes, but even had he advocated these, it is doubtful whether Congress would have adopted them. The system of loans was much easier for politicians. Mr. Chase was the father of our National Bank System. He left in the Treasury a record of great constructive statesmanship. The burden of his office in the Civil War was second only to that of the War Office and not less important. The Atlases of that period were Lincoln, Chase and Stanton. Mr. Chase's only failures were in not securing a greater cooperation from Congress. This was because of his lack of the magnetic influence and tact to make men follow him, though he had the genius to lead and show them how.

Mr. Chase broke with Mr. Lincoln over a matter of patronage, but only after a number of similar differences, in each of which he tendered his resignation, but all of which, except the last, Mr. Lincoln smoothed over with his marvelous patience. After Chase had

felt the humiliation that comes to a man who leaves an office, thinking that he is to pull down the pillars as he goes, and finds out his error, he could not restrain expression of his bitterness. But Mr. Lincoln did not cherish resentment, and when, soon after, the great office of Chief Justice became vacant, upon Taney's death, he called Chase to it. His one concern was that Chase's ambition to be President might interfere with his judicial duties. Mr. Lincoln's expectation that he would so aspire was fully justified by the event. But I think it can not be justly said that Chase's political ambition affected his judicial action.

While on the Bench he was a candidate for the Presidency in 1868, and also in 1872; but he would not vary the principles for which he stood to capture either nomination. If it was anomalous that he should be a candidate before the Democratic Convention of 1868, with a considerable chance of success, the anomaly was only in the fact that leading Democrats had conceived it possible that the party could be reborn and support a man who was strongly and avowedly in favor of negro suffrage, and thus return to its primary principle that all men are created equal.

When Mr. Chase was called to the Bench, he had been out of the practice of the law for more than twenty years, but he had been in executive or legislative office almost constantly. He had been a student of the Constitution and its application to practical government. He had come to be intimately acquainted with departmental organization and methods, and he entered the Court better advised than any other member of that body as to government law, that law which grows and shapes itself by the practice of those who administer it. This made him most valuable in conference on such questions which were to crowd upon the Court while he was at its head.

Mr. Chase wished to be Chief Justice—had told Lincoln so early in his Cabinet experience. He had confidence that he could accomplish much public good by an interpretation of the Constitution making for a safe balance between the national and the state powers. He had a laudable ambition to become a second Marshall in the constitutional reconstruction of the government at its second birth. It is to be doubted, however, whether when he had tested the opportunities the great place afforded him, he was satisfied. He found that he had to carry a load of work which for him was the heavier because his familiarity with the principles of general law had faded some in his political life. He grew impatient with cases between individuals in which the governing principles were not constitutional and were not of public concern. Nor could he in such work separate himself from intense interest in the political questions which were occupying the statesmen of the day, and he longed to be at the helm. This did not interfere with the excellence of his judicial work, but it added to the strain on him.

Chief Justice Chase wrote many able opinions, opinions that have come down and established the law. His decision in the case of *Texas* v. *White*, where

he defined with wonderful clearness the status of the seceded states, is a landmark in constitutional law in this country. Another is his concurring opinion in *ex parte Milligan,* in which he has added to the substance of the law by his definition of, and distinction between, military law, military government, and martial law. The subject has always been a difficult one, and it remained for him to clarify it so far as it has been clarified.

The course of the Legal Tender decisions gave rise to great bitterness of feeling. The Chief Justice was charged with inconsistency due to political bias, in that he supported the legal tender acts as Secretary of the Treasury, and then as Chief Justice held them to be invalid. As Secretary, he did not favor giving a legal tender character to the greenbacks, but he was forced into acquiescence in that feature of the law in order to secure what he regarded as indispensable to the safety of the country. It is only fair to take his own statement of the fact as the true one, namely that as Judge he conscientiously believed, after the fullest consideration, that Congress had not the power to impart to notes issued by it as currency, the character of the legal tender attaching to gold and silver coin.

The Chief Justice was a most dignified presiding officer. He had a strong sense of responsibility for the Court. His capacity to meet the requirements of a great occasion was shown when under the Constitution he had to preside at the trial of the impeachment of President Johnson. The fear that he might exercise influence to save Mr. Johnson led to efforts by the majority to restrain him as presiding officer; but he ignored them, asserted the full power of his position, and ruled with conspicuous impartiality, clearness and force on all the question arising. It was a painful and difficult duty, which fortunately no other Chief Justice has ever had to discharge.

During the incumbency of Chief Justice Chase, popular feeling was strongly aroused against the Court. From time to time, by reason of its jurisdiction and a proper exercise of it, the Court can not help becoming the stormy petrel of politics. It is the head of the system of Federal Courts established avowedly to avoid the local prejudice which non-residents may encounter in State Courts, a function often likely to ruffle the sensibilities of the communities, the possibility of whose prejudice is thus recognized and avoided. More than this, the Court's duty to ignore the acts of Congress or of the State Legislatures, if out of line with the fundamental law of the Nation, inevitably throws it as an obstruction across the path of the then majority who have enacted the invalid legislation. The stronger the majority, and the more intense its partisan feeling, the less likely is it to regard constitutional limitations upon its power, and the more likely is it to enact laws of questionable validity. It is convincing evidence of the sound sense of the American People in the long run and their love of civil liberty and its constitutional guaranties, that, in spite of hostility thus frequently engendered, the Court has lived with its powers unimpaired until the present day.

The assassination of Lincoln stirred the passion of the Northern people and threw power into the hands of the Radical element of the Republican party in Congress. Conflict with Lincoln's successor quickly ensued and a policy of radical reconstruction followed, which we can be reasonably sure would have been spared the South had Mr. Lincoln lived. With a two-thirds majority in each House, the Republican party leaders brooked no opposition, and when that which had been done in due course came before the Court for consideration of its validity, the attitude of those leaders toward the Court grew to be one of suspicion and resentment. Until one refreshes his recollection of that period, he can hardly realize how far the radical Republicans in Congress went in their effort to oust the Court of its jurisdiction. They were afraid that the Court would pronounce their reconstruction measures invalid. They were stirred to this fear by the decision in *ex parte Milligan,* in which the Court refused to recognize the power of the President in time of war to direct a Military Commission to try for treason and sentence to death, a civilian in a state not invaded by the enemy and where the civil courts were functioning. For fear that the Court might hold invalid the work of such Commissions when organized under the reconstruction acts by military governors in the Southern States, Congress took the case of McArdle, presenting the question, from the Court's consideration, after it had been argued and submitted, by abrupt repeal of its jurisdiction. In the heat of the feeling against the Court, bills were proposed limiting its power to declare laws invalid by a majority, and there were serious proposals made to abolish this power of the Court altogether. The personal attacks made upon the Court by the party press were severe and unmeasured. This was the atmosphere in which Chief Justice Chase lived during his judicial service.

While mistakes were made by the Court in those days, as at other times, for it was and is a human institution, one can not see, in looking back to that decade, that there is anything in the constitutional law as it was handed on to the next generation which is to be condemned. The result in the Legal Tender cases is still a matter of discussion by historians, students of constitutional law and political economists. The decision in the Slaughter House cases, which awakened great protest, certainly served to maintain a wise balance between the national and the state powers. The Milligan case, which called out the bitterest criticism, nevertheless laid down the principle of the maintenance of constitutional right during war, for which we are now all grateful.

The verdict of the country in retrospect as between the fever heat of the Radical Republicans in those tempestuous times against constitutional hindrance, on the one hand, and the restraining decisions of the Court, on the other, is with the Court. The people now are glad that the guaranties of personal liberty were maintained by the Court against the partisan zeal of the then majority. The Court survived the inevitable attacks upon its jurisdiction then, as it had survived them so many times before. The storm during Chief Justice Chase's term was succeeded by a judicial calm of twenty-five years till we neared another war. This result speaks on the whole for the wisdom of the conclusions of the Court over which the Chief Justice presided.

Chase was a great man. He has had the disadvantage in history of comparison with Lincoln. Next to Lincoln, he stands out as a great civil figure of the decade of the Civil War. He was actuated by moral force. He had the defects of his attributes, but among those attributes were devotion to principle, courage of convictions, indefatigable industry, and a profound patriotic desire to achieve in the public interest.

JAMES KENT: A MASTER BUILDER OF LEGAL INSTITUTIONS

Hon. Charles E. Hughes, Secretary of State, Pays Tribute to Constructive Labors of Great Jurist in Oration Delivered at Celebration of Centennial of His Resumption of Connection With Columbia University as Professor of Law

WE have met to commemorate the service of one of the master builders of our legal institutions. As the occasion for this tribute, it is significant that we have chosen the anniversary, not of his birth or of his assumption of the public offices which he adorned, but of the renewal of his association with this University, when, his official duties ended, he found opportunity for his crowning achievement as the expounder of the law. While John Marshall has the unrivaled and imperishable distinction of making secure the constitutional foundations of our national life, James Kent, through the wide range of his constructive labors, his mastery both of common law and equity, and the comprehensive exposition of his Commentaries,—the first and still the best of our comprehensive legal treatises,—is justly acclaimed as the father of American jurisprudence.

He lived in a troublous formative period, but his energies were not consumed in strife. Seldom has opportunity so well served talent; seldom have rare gifts found such congenial tasks. As we contemplate his life work, with its consistent purpose, its enrichment by incessant studies and its constantly expanding influence, we are reminded of the strong and even flow of a majestic stream, fed from a thousand sources, as it drains a vast watershed and pushes on with ever increasing depth and power.

Born in 1763, he was too young to take part in the War of Independence. When the clear note of triumph was sounded on the battlefield of Saratoga, he was beginning his studies at Yale. His college course was disrupted by the war and, apart from this, its value was mainly inspirational. In his own opinion, "the test of scholarship at that day was contemptible"; still the curriculum served to give a taste for classical learning and to teach students how to cultivate their own resources. When the college was dispersed by the British in 1779, Kent retired for a time to a country village and, in that unlikely spot, this youth of sixteen, studious and tranquil in the midst of alarms, chanced upon a copy of Blackstone. He read the four volumes and determined to be a lawyer. Immediately upon graduation in 1781, returning to the State of New York and to his native country of Dutchess, he entered the law office of Attorney General Benson at Poughkeepsie. He had no law school, but slight guidance, and few books. The unsettled conditions of the time kindled excitement and gave little encouragement to industry. But, in his own words, he was "the most modest, steady, industrious student that such a place ever saw." His fellow students thought him very odd and dull in his taste, but he was looking to heights beyond their imaginings. The dominating ambition of his life had already seized him and this was nothing short of the complete mastery of the jurisprudence of his time. He soon learned that the field of law was boundless and he rebelled at his material. He disliked "the voluminous rubbish and the baggage of folios," but he was determined to put in a claim for "some of the honors which imprint immortality upon characters." He was satisfied with nothing that was temporary, showy or sensational; he chose the hardest way, seeking the loftiest eminence. Again we are reminded that the masters have learned the art of mastery in self-discipline. Kent set his own tasks, and his own intelligence directed his efforts.

He began as a law student with Grotius and Puffendorf; he made abridgements of Rapin's dissertation on the laws and customs of the Anglo-Saxons, and of Hale's history of the common law and the old books of practice, while at the same time he diligently pursued historical studies. Thus equipped, he was admitted to the Bar in 1785 and at once married, as he tells us, "without one cent of property"; he was twenty-one and his wife sixteen, and "that charming and lovely girl" was for sixty-three happy years "the idol and solace" of his life. While he contentedly adjusted himself to his environment, the opportunities for professional practice afforded by Poughkeepsie, a village of less than 1,500 inhabitants, were slight at the best, and for one of Kent's disposition were still more limited. He had no talent for advocacy, was never fond of the contentions of the Bar, and disliked the drudgery of practice. This, however, proved to be an advantage; his studies absorbed him, and he gave free rein to his talent, making the best possible preparation for the best service he could render to his time. He tells us how, abashed at his own ignorance, when Edward Livingston read in his hearing some passage from a pocket Horace, he at once undertook the mastery of the classics. Never was study more thorough and systematic. For ten years he steadily divided the day into five parts and allotted them to Greek, Latin, law, business, and to French and English varied literature. We contemplate these self-imposed tasks with mingled emotions,—of admiration at his assiduity, and of envy at his freedom from modern enticements and the conspiracies of a thousand organized activities to consume energy and to destroy both inclination and opportunity for such intensive self-culture. No one understood better than Kent the secret of a well-rounded life in the noble employment of leisure.

These formative years were after all fortunately spent at Poughkeepsie, for he not only could follow his bent in study but he had the benefit of contact with leaders of opinion. To accommodate Governor George Clinton, in command of the revolutionary forces of the State, the new legislature was called to meet in Poughkeepsie in 1778 and several of its sessions were held there prior to the British evacuation of New York. Thither came eminent lawyers, and young Kent was fascinated and instructed by the forensic contests in the Circuit Court. Among others came Alexander Hamilton, only six years older than Kent, with a distinguished military record, winning his spurs at the Bar. It was in 1784, when Hamilton was only twenty-seven, that Kent first saw him in the trial of a case, and was struck with his commanding manner, his fine

melodious voice, his reasoning powers and persuasive address. To Kent's eye, Hamilton soared far above all competition. In the following year Kent attended a term of court at Albany, when he was admitted to practice, and he had the satisfaction of seeing Hamilton pitted against Chancellor Livingston, who appeared at the Bar in his own behalf in his ejectment suit to recover lands on the south bounds of the lower manor of Livingston. Kent revelled in the contest. But the greatest event in his experience during this period was the assembling at Poughkeepsie, in 1788, of the New York Convention to consider the ratification of the Federal Constitution. Laying aside all else, he was unremitting in his attendance at the convention and "was an eye and ear witness to everything of a public nature that was done and said." He heard Hamilton day after day as he argued his points with an eloquence never surpassed, and, winning over his chief opponent, Melanchton Smith, performed the extraordinary feat of overcoming in a hostile atmosphere a well-organized opposing majority by the sheer force of his reasoning. We today reconstruct the scene and gaze with the same fascination, as held Kent enthralled, at the spectacle of this young man of thirty-one pouring out learning and wisdom and securing by consummate leadership the momentous decision which incorporated the State of New York in the indissoluble Union.

Kent had begun in 1786 to be a zealous Federalist. He read everything on politics; he "got the Federalist almost by heart" and he had the good fortune to enjoy an intimacy with Hamilton to whom he gave his unreserved intellectual allegiance. Not the least of Hamilton's achievements was the influence he exerted over Marshall and Kent, the foremost legal minds of his time. When his career ended with tragic abruptness, Hamilton lived on in the labors of these great jurists. It was Hamilton's logic that was the cornerstone of the opinion of Marshall in *McCullouch against Maryland,* and it was the political principles of Hamilton that dominated the thought of the great commentator.

Kent had a more direct approach to political activity when in 1790, and again in 1792, he was elected to the New York Assembly. His writings and speeches gave him some notoriety, and he showed energy and ability in his leadership of the minority against the action of the State canvassers in throwing out the votes of Otsego County and thus defeating John Jay and re-electing George Clinton as Governor. The strength of character and sound principles which he displayed in this bitter controversy won for him the enduring friendship and esteem of Jay, who conducted himself with rare forbearance and magnanimity during the whole affair. But the contest hurt Kent's political chances, and, defeated for Congress in 1793, he removed without regret to New York City and thus a new era in his life began. Such was his repute for learning that at the close of that year, at the age of thirty, he was elected Professor of Law in Columbia College and was thus drawn to deeper legal researches. He at once read, in the original, Bynkershoek, Quintilian, and Cicero's rhetorical works, besides reports and digests, and began the compilation of his lectures.

His introductory lecture, of remarkable quality, was delivered in November, 1794. With dignity and power he reviewed the fundamental principles of our institutions and set forth his conception of the breadth of the preparation which he deemed to be essential for the lawyer. But the most significant part of his lecture was the emphatic and illuminating statement, eight years before Marshall's decision in *Marbury against Madison,* upon the function of American courts in passing upon the constitutional validity of legislative acts. Kent's view may indeed be regarded as a reflection of what we know to have been the preponderant opinion at the time the Federal Constitution was adopted. Hamilton said in the Federalist: "A constitution is in fact, and must be regarded by the judges, as a fundamental law; . . . If there should happen to be an irreconcilable variance between the two, . . . the constitution ought to be preferred to the statute." The most recent and exhaustive examination of the current literature of the early period, a time of incessant and heated political controversy, has disclosed the fact that while in these years the State courts and the Federal circuit courts were exercising the power to pass upon the validity of statutes, it evoked before 1802 but little opposition.[1] Kent's statement, however, was more than a reflection of a current opinion; it was a definite, terse and comprehensive presentation both of the doctrine and of the reasoning that supported it, and no tribute can be complete which fails to direct attention to this strong and prophetic expression. Referring to the doctrine as "peculiar to the United States," he said:

> . . . But in this country we have found it expedient to establish certain rights, to be deemed paramount to the power of the ordinary Legislature, and this precaution is considered in general as essential to perfect security, and to guard against the occasional violence and momentary triumphs of party. . . .
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> No question can be made with us, but that the Act of the Legislative body, contrary to the true intent and meaning of the Constitution, ought to be absolutely null and void. The only inquiry which can arise on the subject is, whether the Legislature is not of itself the competent Judge of its own constitutional limits, and its acts of course to be presumed always conformable to the commission under which it proceeds; or whether the business of determining in this instance, is not rather the fit and exclusive province of the Courts of Justice. It is easy to see, that if the Legislature was left the ultimate Judge of the nature and extent of the barriers which have been placed against the abuses of its discretion, the efficacy of the check would be totally lost. The Legislature would be inclined to narrow or explain away the Constitution, from the force of the same propensities or considerations of temporary expediency, which would lead it to overturn private rights. Its will would be the supreme law, as much with, as without these constitutional safeguards. . . .
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> When powerful rivalries prevail in the Community, and Parties become highly disciplined and hostile, every measure of the major part of the Legislature is sure to receive the sanction of that Party among their Constituents to which they belong. Every step of the minor Party, it is equally certain will be approved by their immediate adherents, as well as indiscriminately misrepresented or condemned by the prevailing voice. The Courts of Justice which are organized with peculiar advantages to exempt them from the baneful influence of Faction, and to secure at the same time, a steady, firm and impartial interpretation of the law, are therefore the most proper power in the Government to keep the Legislature within the limits of its duty, and to maintain the Authority of the Constitution.

These words are as timely today as when they were uttered by young Kent at the threshhold of his professorship. While Kent's lectures elicited approval, the time was not ripe for such an undertaking. On the flyleaf of his own copy, he records that the first season he read twenty-six lectures, attended by seven students and thirty-six others, chiefly lawyers and law students not connected with the college. The second course, in 1795, he gave in his office and he had only two students besides his clerks. The next season no students attended, and Kent resigned, but his resigna-

1. Warren's Supreme Court in United States History, Vol. I, pp. 256-257.

tion not being accepted, he read one more course to six or eight students. It was natural, as he confessed, that this discouraging experience "cooled and dulled his ardor" for finishing and perfecting his lectures. He longed to enter on his old classical career, to realize property enough to withdraw into the country and there to live in retirement. Oddly enough, despite his eager spirit, this was always a cherished hope.

Meanwhile he was on the straight road to deserved preferment. In February, 1796, Governor Jay appointed him a Master in Chancery, and this gave him adequate pecuniary support. About the same time he was elected a member of the Assembly from New York, and a year later he was appointed Recorder of the City of New York, an office then exclusively occupied with civil business. With his official duties and counsel work in the Supreme Court he was busy and prosperous. He was soon to reach the goal he now desired, and in 1798 he was appointed Judge of the Supreme Court of the State. "This," he says, "was the summit of my ambition. My object was to retire back to Poughkeepsie, and resume my studies, and ride the circuits, and inhale the country air, and enjoy *otium cum dignitate*. I never dreamed of volumes of reports and written opinions; such things were not then thought of." In 1799, Kent removed to Albany and there he remained for twenty-four years. In 1804 he was made Chief Justice of the Supreme Court and he held that office until in 1814 he became Chancellor. His judicial labors continued until, by virtue of the sapient provision of the Constitution of the State, he was forced to retire, having reached the age limit then fixed at sixty years.

Mr. Justice Holmes has remarked that "to read the great works of the past with intelligent appreciation is one of the last achievements of a studious life." And this is especially true of early legal decisions and treatises. It is impossible to appraise Kent's judicial work without visualizing the conditions which obtained before he went upon the Bench. Twenty years had passed since the adoption of the first Constitution of the State, but the jurisprudence of the State was in a miserable condition; indeed it was almost non-existent. Lack of legal scholarship and care on the Bench found their counterpart in the poor standards of the Bar. Let Kent himself tell the story:

> The progress of jurisprudence was nothing in this State prior to the year 1793. There were no decisions of the court published. There were none that contained any investigation. In the City of New York, Hamilton, Harrison, Burr, Cozine and perhaps old Samuel Jones (then deemed and known as the oracle of the law) began to introduce the knowledge and cultivation of the law which was confined of course to Coke, Littleton and the reporters down to Burrow. . . . The judges of the Supreme Court (Morris, Yates and Hobart) were very illiterate as lawyers, and the addition of John Lansing in 1790 was supposed to be a great improvement to the Bench, merely because he appeared to have studied more the King's Bench practice and was more diligent, exact and formal in attending to cases and in enforcing rules of practice. The country circuit courts were chiefly occupied in plain ejectment suits and in trying criminals in the courts of Oyer and Terminer. In short, our jurisprudence was a blank when Hamilton and Harrison first began with their forensic discussions to introduce principles and to pour light and learning upon the science of the law. . . . Again, when I came to the Bench there were no reports or State precedents. The opinions from the Bench were delivered *ore tenus*. We had no law of our own and nobody knew what it was.

Kent was the needed revolutionary leader. But it is not the mere fact of giving opinions in writing, as we all well know, but what is brought to their preparation, that counts. Kent had a rare equipment as a legal scholar but he was not content with this; he did not survey his task with any of the intolerant assumptions which vex the Bar. He was not satisfied in any case until he had examined all the law, and all the writings of jurists,—until he had thrown upon the subject all the light that legal literature could give. He not only made exhaustive researches to decide particular cases but he constantly added to his general stock of learning. In his first years as a Judge he read Vattel and Emerigon, and made copious digests of all the new English reports and treatises as they came out.

Kent had an unsurpassed opportunity to lay the basis of a sound jurisprudence. This opportunity had really been given by the framers of the first Constitution in 1777. They were young men with little experience. John Jay, supposed to be its chief author, was only thirty, Robert R. Livingston was twenty-nine, and Gouverneur Morris was twenty-four, when they undertook in the Constitutional Convention the work of the committee to frame a new form of government. The Constitution which was destined to be the fundamental law of the State for forty-four years was produced amid the excitements and dangers of war. The Convention was forced to move about from place to place to avoid attack and possible capture by the British. But these young men, generous spirits with love of liberty, did not permit their judgment to be overcome by either excitement or peril. They were conservative reformers, attached to the institutions of the Colony so far as these were deemed to be consistent with freedom. Pressed by the British in arms, they still cherished the traditions of British law. They had no disposition to wreck the hopes which had centered in independence by ambitious radical experiments; they sought not to destroy but to adapt. It would be interesting to dwell upon the highly centralized government which was thus established, following the tradition of the Colony, and which it took so long to modify in the interest of a proper degree of local autonomy. But whatever may be said of other provisions of the first Constitution there can be no doubt of the wisdom of its 35th article by which it was ordrained that such parts of the common law of England and of the statute law of England, and of the acts of the Legislature of the Colony of New York as together formed the law of the Colony on April 19, 1775, should continue to be the law of the State subject to such alterations and provisions as the legislature should make. Here then was a rich field, but little tilled, awaiting the learning and skill of the great jurist. Kent had the power of keen analysis; he had a correct historical perspective. He did not create institutions, but he did what was far better. With vast industry and discriminating judgment, he took account of our noble inheritance in the materials accumulated by the juristic labors of the past, and with a privileged liberty of selection and combination he made the adaptation necessary to the new political and social conditions resulting from the Revolution. He thus supplied the legal concepts and precepts which formed the content of a distinct jurisprudence.

At this time the Supreme Court of the State consisted of the Chief Justice and four associates. Kent's learning and pertinacity soon gave him an ascendancy. He used every precedent he could find, but he was not looking for mere cases to follow but for correct principles to apply. To discover these he searched the civil law as well as the common law. He made much use of the *corpus juris* and as the Judges, with the

exception of Livingston, knew nothing of the French or civil law, he had an immense advantage. He tells us that he could usually put his brethren to rout and carry his point by his "mysterious wand of French and civil law." The judges, with the liberal views of the period, were kindly disposed to everything that was French and this enabled Kent without exciting any alarm or jealousy, to make free use of such authorities and thus to enrich our commercial law.

His directing influence in the Court was enhanced by his appointment as Chief Justice. The first practice was for each Judge to give his portion of the opinions, when all were agreed, but that gradually fell off, and in the later years Kent gave the most of them. He recalls that "in the 8th Johnson all the opinions for one term are *per curiam!* The fact is, I wrote them all and proposed that course to avoid exciting jealousy." But Kent did not lack opposition. He found his brother Spencer, particularly, of a bold, vigorous, dogmatic mind and overbearing manner. But Kent labored his cases all the more thoroughly in his attempt to bear down opposition or shame it by the overwhelming authority he called to his aid. He had zest in conflict and felt that his mind "was kept ardent and inflamed by collision." He could do more than overwhelm his opponents; he could correct himself. Thus, in 1806 he tried a trespass case at Circuit, which turned on the sufficiency of a gift of growing corn; Kent charged the jury that there was sufficient evidence of a valid gift, but on a motion for a new trial, as Chief Justice, he wrote a learned opinion for the Court reversing himself and stating the distinction between the civil and common law as to the necessity of delivery.[2]

Not only did Kent develop the common law but he safeguarded its institutions. In the bitter contest over the proceedings for contempt against John Van Ness Yates he established the immunity of the judges from private prosecution for the exercise of their official powers, and thus rendered secure the independence and authority of the courts.[3] Otherwise he said "we shall embolden the licentious to trample upon everything sacred in society and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty." He was equally solicitous to preserve inviolate the essentials of trial by jury, and to prevent any encroachment by the Court upon the proper freedom of the jury. In the *Croswell* case, a prosecution for a libel of Thomas Jefferson, Kent asserted the right of the jury to judge of the law as well as of the facts in criminal prosecutions for libel, and thus buttressed the liberty of the press. To hold differently, he asserted, would give the absolute control of the press to the judges. He decided that the Court was not bound by the decisions of Lord Raymond or his successors, and he expressly adopted the views of Hamilton that "the liberty of the press consisted in the right to publish with impunity, truth, with good motives for justifiable ends whether it respects government, magistracy or individuals."[4] The Court was evenly divided but Kent's opinion served to establish the law, and the rule he laid down for prosecutions for criminal libel, as to the right to give evidence, in defense, the truth of the matter charged as libelous, and thus to justify provided it was published with good motives and for justifiable ends, and as to the right of the jury to pass upon the law as well as the fact, was at once declared by the Legislature and was subsequently incorporated in the Constitution of the State. It may also be noted here, although it pertains to a later period, that it was Kent, sitting in the Court of Errors, who laid down the rule that the judges had no authority to give a positive direction to the jury upon a question or fact. The jury must be left free to hear the evidence and determine the facts.[5]

Even more fruitful work, even more congenial to his abilities, than his service in the Supreme Court, awaited Kent when he was appointed Chancellor. Following the practice of the Colony, the State had maintained separate courts of law and equity, but the Court of Chancery had evoked a popular distrust. The importance of its jurisdiction in dealing with the intricacies of interests which lay beyond the bounds of the remedies of the common law, was not appreciated, and the exercise of the extraordinary power of the Chancellor seemed to be inconsistent with the liberties of the people. What was worse, the Court of Chancery had failed to justify itself by either method or results. It appeared in its ineptitude to distrust itself, and the intelligent and systematic exercise of its power was lacking. It was not until Kent became Chancellor that we had a court of equity in a true sense. It is extraordinary that, notwithstanding the example furnished by the developments in the Supreme Court under Kent's leadership, such defective methods should have continued in Chancery. Kent took the office of Chancellor with considerable reluctance; it had no charm for him. Of its condition he says: "It is a curious fact that for the nine years I was in that office, there was not a single decision, opinion or dictum of either of my predecessors,—Livingston and Lansing, from 1777 to 1814, cited to me or even suggested. I took the Court as if it had been a new institution and never before known in the United States."

Kent had nothing to guide him; he was left at liberty to assume all such English chancery practice and jurisdiction as he thought applicable under our Constitution. Here was wealth of material at his command, the product of the labors of the great English Chancellors from Nottingham to Eldon, but the equity system of England could not be transferred bodily. In this country there were new institutions, new relations, different political conceptions requiring an American system of equity which, while its seeds might be brought from abroad, must strike its roots deep into American soil. This was the extraordinary service of Kent, that he was not enslaved by his comprehensive knowledge or overawed by the learning of the past, that his energy was not exhausted in the toil of research and transcription, or in the laborious study of the complicated details of his cases, but always the easy master of his material he used it with the sagacity of a statesman and with the skill of constructive genius, rejecting, selecting, adapting and adding until he gave to the country an equity system suited to its particular interests.

With this aim, in the prime of life, he redoubled his efforts. He is very frank about his method: "My practice was," he says, "first to make myself perfectly and accurately (mathematically accurately) acquainted with the facts. It was done by abridging the bill and the answers and then the depositions; and by the time I had done this slow and tedious process I was master of the case, and ready to decide it. I saw where justice lay, and the moral sense decided the case half the

2. Noble v. Smith, 2 Johns. 395.
3. Yates v. Lansing, 5 Johns. 282; 9 Johns. 395.
4. People v. Croswell, 3 Johns. Cases, 363.
5. Firemen Insurance Co. v. Walden, 12 Johns. 514.

time. And then I sat down to search the authorities until I had exhausted my books; and I might once in a while be embarrassed by a technical rule, but I always found principles suited to my views of the case, and my object was so to discuss the point as never to be teased with it again, and to anticipate an angry and vexatious appeal to a popular tribunal by disappointed counsel." His industry, absolute integrity and love of justice established the confidence needed to counteract the prejudice against the Court, and he was intrenched in public esteem. "It required," says Story, "such a man, with such a mind, at once liberal, comprehensive, exact and methodical . . . pursuing principles with a severe and scrupulous logic, yet blending with them the most persuasive equity; it required such a man, with such a mind, to unfold the doctrines of Chancery in our country and to settle them upon immovable foundations."

But these endeavors were not free from vexation; he suffered much humiliation at the hands of smaller men. The reversals of his decisions by the Court of Errors, that extraordinary Court of last resort, composed of the members of the State Senate as well as of the Chancellor and the Judges of the Supreme Court, nearly broke his heart. In a moment of utter depression he writes to William Johnson in 1820:

> The judges have prevailed on the Court of Errors to reverse all my best decisions. They have reversed Frost v. Beekman, the Methodist Episcopal Church v. Jacques, Anderson v. Boyd, and others. After such devastation, what courage ought I to have to study and write elaborate opinions? There are but two sides to every case and I am so unfortunate as always to take the wrong side. I never felt more disgusted with the judges in all my life. . . . According to my present feelings and sentiments, I will never consent to publish another opinion, and I have taken and removed out of my sight and out of my office into another room my three volumes of chancery reports. They were too fearful when standing before my eyes."

After this outcry of a wounded spirit, Kent continued his work with the same energy and resourcefulness.

His opportunities for safeguarding the development of the law were increased by his membership in the Council of Revision, that curious arrangement by which the Governor, the Chancellor and the Judges of the Supreme Court, exercised the veto power. It can hardly be said that this extraordinary authority of judicial officers was abused. Chancellor Livingston, and Kent as Judge and Chancellor, each served in the Council of Revision for twenty-four years. Yet during the forty-five years of the existence of the Council, only 169 bills were vetoed out of 6,590 bills passed. It appears that 83 bills were vetoed as unconstitutional, and as the most of these were not passed over the veto, they were thus disposed of without coming before the courts.

Despite his talent for adaption and improvement, Kent remained in politics the stoutest of conservatives. In the Constitutional Convention of 1821 he opposed the abolition of property qualifications for the suffrage. He observed that the great body of the people of the State were the owners and actual cultivators of the soil, and with that wholesome population he expected to mind "moderation, frugality, order, honesty and a due sense of independence, liberty and justice." He foresaw that we were destined to become a great manufacturing and commercial State, and he wished to preserve the Senate of the State as the representative of the landed interest. He was appalled at the growth of New York City, which had advanced from a population of 21,000 in 1773 to 123,000 in 1820; it was to be the London of America, and with universal suffrage and under skilled direction it would govern the State. He wished to give to freeholders of moderate possessions a sure and effective control. He asserted that the danger to be apprehended was not the want, but the abuse, of liberty. "We have to apprehend," he said, "the oppression of minorities, a disposition to encroach on private right, . . . to weaken and overawe the administration of justice, to establish unequal and consequently unjust systems of taxation and all the mischiefs of a crude and mutable legislation."[6] But the rising tide of democracy was too much for him. While the threatened evils were clear enough, he could not see that his remedies were futile. Democracy must be its own savior, and security is to be found, if at all, not in the denial of the right of participation in the affairs of government, but in education, public discussion and the self-imposed restraints of an intelligent and justice-loving people. There is no shorter way.

Kent continued to be filled with forebodings and he was not alone in his appraisals. Daniel Webster wrote to him in 1830: "We are fallen on evil times, as times are when public men seek low objects, and when the tone of public morals and public feeling is depressed and debased." It was a few years later that Kent addressed the lawyers of New York in words which seemed to have been written for 1923 rather than for his own day: "We live," said he, "in a period of uncommon excitement. The spirit of the age is restless, presumptuous, and revolutionary. The rapidly increasing appetite for wealth, the inordinate taste for luxury which it engenders, the vehement spirit of speculation and the selfish emulation which it creates, the growing contempt for slow and moderate gains, the ardent thirst for pleasure and amusement, the diminishing reverence for the wisdom of the past, the disregard of the lessons of experience, the authority of magistracy and the venerable institutions of ancestral policy, are so many bad symptoms of a diseased state of the public mind." Thus spoke Kent nearly ninety years ago, and it is heartening to reflect that we are still here. Kent was even discouraged with respect to the great institution which he revered, the Supreme Court of the United States. Writing to Justice Story on his retirement, he exclaims: "What a succession of great and estimable men have you witnessed as associates since you ascended the Bench. Now what a melancholy mass it presents!" We may take comfort in reading the pessimistic utterances of early days, as we address ourselves to the never-ending task of making democracy work and we may be inspired with new faith and courage as we get the vision of the protecting hosts of moderation, sanity and sober living, which the discouraged patriots and prophets of the past were unable to see.

When, in 1823, at the height of his intellectual power Kent reached the age limit prescribed for judicial officers, Columbia College recalled him to its faculty and thus had the good fortune to link to itself the most important service of his long career. His lectures as professor of law, remodeled and enlarged, became his Commentaries. The first volume was brought out in 1826 and the four volumes were completed by 1830. This gave him the opportunity to present in a systematic manner the results of the thorough and comprehensive legal studies which he had unceasingly prose-

6. Hammond's History of New York, Vol. II, pp. 32-40.

cuted from his youth to the end of his judicial labors. Moreover, as Lincoln expressed it, Kent's "attitude was most favorable to correct conclusions. He was struggling to rear a durable monument of fame; and he well knew that truth and thoroughly sound reasoning were the only sure foundations." If Blackstone "taught jurisprudence to speak the language of the scholar and the gentleman," Kent, in Story's phrase, "embodied the principles of our law in pages as attractive by the persuasive elegance of their style as they are instructive by the fullness and accuracy of their learning." While there was similarity in the general aim of the two treatises, the differences in plan and arrangement are more important than the resemblances. Kent had no predecessor in his own field, and his work abides as the model of legal exposition.

Kent could now deal, not only with those subjects which had most frequently engaged his attention as Judge and Chancellor, but with such departments as international and constitutional law, which he had touched but rarely in the course of his official duties. He had been a close student of the law of nations, and when his work on the Bench gave occasion to discuss it, as in the case of *Griswold against Waddington*,[7] where he dealt elaborately with the consequences of war in its effect upon the intercourse and contracts of the subjects of the belligerents, he was at his best and revealed the range of his researches. Kent began his Commentaries with the Foundation and History of the Law of Nations, observing that when the United States ceased to be a part of the British Empire and assumed the character of an independent nation, "they became subject to that system of rules which reason, morality and custom had established among the civilized nations of Europe as their public law." His treatment of international law at once challenged attention abroad as well as at home and received the highest commendation from the most expert critics. Professor Abdy, of the University of Cambridge, who published this part of Kent's treatises in a separate edition, speaks of his work as containing "wisdom, critical skill and judicial acumen of the highest kind," and he most cordially assented to the tribute of Historicus, who described Kent as "the greatest jurist which this age has produced, whose writings may safely be said to be never wrong."

Kent exhibited the same mastery and power of lucid and accurate expression in that part of his work which dealt with the Government and Constitutional Jurisprudence of the United States. Here he was on ground familiar to him from the days when he heard Hamilton's arguments for the Constitution, and if he wrote with a lawyer's skill and restraint it was still with the patriot's appreciation. Kent had the strong views of a Federalist, but there had been, as to one matter of grave importance, a sharp difference of opinion between Kent and Marshall. In the contest over the grants by the New York Legislature to Livingston and Fulton of the exclusive navigation of the waters of the State in steam vessels, Kent had sustained the validity of the grants upon the ground that they related to internal commerce and were not in conflict with any regulation of Congress. Marshall, in the epoch-making opinion in *Gibbons against Ogden*,[8] held the contrary,—paying, however, his tribute to Kent in his reference to the decisions of the State courts which he said were "supported by great names—by names which have all the titles to consideration that virtue, intelligence, and office, can bestow." Marshall laid down the doctrine that commerce is more than traffic; it is intercourse and includes navigation; that the power of Congress to regulate interstate and foreign commerce is complete in itself, may be exercised to its fullest extent, and acknowledges no limitations other than are prescribed in the Constitution. While establishing broad definitions, which have ever afforded the necessary basis of national unity and progress, Marshall rested the decision of the particular case upon the ground that the legislative acts of New York were in collision with the acts of Congress regulating the coasting trade, and hence had to yield to the paramount Federal power. In his Commentaries Kent points out this basis of the decision, saying that the Supreme Court of the United States and the State courts did not differ in any general view of the power of Congress,[9] and Story, who took part in the decision, subsequently in his own Commentaries on the Constitution refers to Kent's "able and candid review of the whole subject."[10] It must be admitted, however, that Kent did not appear to have the statesmanlike grasp of Marshall of the full import and vast importance of the commerce clause, and the general principles of Marshall's opinion transcended in their permanent influence the technical limitations of the decision. There was yet to come the clarifying and determining principle announced for the Supreme Court by Mr. Justice Curtis in the case of *Cooley* v. *Port Wardens*,[11] that when the subject is national in character and admits and requires uniformity in legislation, Congress alone can act upon it, while if the subject is local in its nature or sphere of operation which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority.

Kent's Commentaries were an immediate success, passing through four editions by 1841 and, until his death in 1847, Kent enjoyed the full pleasure of the complete recognition by a grateful people of the transcendent importance of his long and arduous labors. He also had reason to know, as Charles Sumner wrote him, that in addition to the spoken words of esteem "the mighty tribute of gratitude was silently offered to him from every student of the law in our whole country." Where among all of our profession can be found a more perfect and useful life?

In reviewing this career and in considering in its light the exigencies of our own day, we cannot fail to be impressed with the imperative need of the competent exposition of the law. When Kent labored there were few law reports; we are now overwhelmed by their multitude. The courts then handed down few opinions; there are now far too many. Kent by his industry could command all the legal learning of his time; now it is given to but a small number to master a single department of the law. Then the problem was how to develop a body of law; now the question is how the growth of that body can be controlled and how it may be subdued to the proper service of perplexed lawyers, their still more puzzled clients, and our overburdened courts. In these United States we have the greatest output of law the world has ever seen. It is our chief product; forty-eight sovereignties have an unexampled producing organization. The appetite for legislation is insatiable. Every statute has its progeny

7. Griswold v. Waddington, 15 Johns. 57; 16 Johns. 438.
8. Gibbons v. Ogden, 9 Wheat. 1.
9. Kent's Commentaries, Vol. I, pp. *433-438.
10. Story on the Constitution, Vol. II, Sec. 1071, note.
11. Cooley v. Board of Wardens, 12 How. 299.

of decided cases, and many decisions instead of settling the law raise questions to be settled by other decisions, while the keenest minds of the country are devoting themselves to finding new differentiations in applying old principles. Thus it has come to pass, we are told, that in a recent year there were 175,000 pages of reported decisions in the United States. We need the master expositor; only we require a hundred Kents instead of one. Fortunately the exigency is appreciated and the Bar of the United States, under the guidance of its most distinguished leaders, has set before it the colossal but necessary task of the systematic, scientific statement of the principles of the law. For this work, which is the special obligation of the Bar, we find both the inspiration and the pattern in the achievements of Kent. In his luminous simplicity, and in his accuracy of exposition, he achieved an authority even greater than that of most of the particular precedents he cited, and his text created a well-nigh conclusive presumption of law.

It must ever be emphasized that democracy rests upon law; upon the commonly accepted principles of conduct to which appeal may be made against both private wrong and every attempted exercise of arbitrary power. In truth, respect for democracy is essentially respect for law; they cannot be divorced without either tyranny or anarchy. Liberty may be won by the sword, but it can be maintained only by the orderly arrangements and precepts which make up the law; and at this time our capacity for free government will be measured not merely by our general respect for law in the abstract, but by our ability to extricate ourselves from the complexities of our own making and by our success in improving the law and in attaining a reasonable simplicity in the setting forth of the principles that govern our intricate network of interests. While we cannot permit ourselves to be deceived with respect to the magnitude of the undertaking, it is no more impossible of accomplishment by the organized Bar of the United States, with its ample facilities and the trained talent at its command, than it was for Kent by his unaided efforts to master and set forth the jurisprudence of his time. What is needed is the determination of Kent, his ideals, his indefatigable labor, his method and exactness.

But the law, however well conceived or set forth, cannot be maintained without the institutions which interpret and apply it; and it is idle to hope for respect for these institutions unless they deserve it by the efficiency of their administration. Kent indeed performed an inestimable service to the law, but it was his happy privilege in the course of the service, and by means of it, to dignify and elevate in public respect our judicial tribunals during the critical and formative period. The judicial power, as often observed, is with us the weakest of all; it commands neither the purse nor the sword; in its best exercise it makes no appeal to the emotion; it attests simply self-imposed restraints which depend upon a common love of justice. Fallible, like all human institutions, our courts still remain the assurance of our domestic peace, and in the long run they afford us far less reason for anxiety and regret than either of the other departments of government. If we have tranquil States it is because the people believe in the reign of law and maintain the integrity of their courts. If we have a Nation, with the immense advantage of national authority adequate to meet all national needs, and at the same time are able to prevent the unseemly clashes of legislative power and to maintain a desirable local autonomy, it is because we have the Supreme Court of the United States, through which differences can be reconciled and the Constitution upheld. If controversies over legal rights are to be determined peacefully, there must be a tribunal to determine them. This is as true, I may say, in international as well as in national affairs, and the American love of peace and sense of right, and the conviction born of our own experience, have made it a definite part of American policy that we should do all in our power to secure provision for the peaceful settlement of international disputes by the establishment of a permanent tribunal of international justice. Our particular interests as a nation require it, in order to give more adequate protection to our own rights; the interests of world peace demand it. Temporary tribunals of arbitration, which meet to determine a particular controversy and then are dissolved, are but an imperfect system of judicial settlement. Political considerations are likely to obtrude in the case of such tribunals which are created by the parties to the controversy after it has arisen. What is even more serious is that it is increasingly difficult to agree on arbitrators, or upon the umpire, who will really decide the case. It is usual to provide, as some provision must be made, that if the parties to the dispute cannot agree the umpire shall be appointed by some designated government. But this gives to another government the final appointment of the judge that is to decide the case. How unsatisfactory is such a method as compared with the opportunity to submit a controversy to a permanent international court composed of the ablest and most impartial judges, not appointed simply to deal with a particular dispute after it has arisen, but, acting as a court in accordance with judicial standards, and giving their continuous and expert service to the interpretation and application of international law. There are those who say that we should perfect international law before we have a permanent court of international justice. They ignore the fact that in the meantime we must have arbitral tribunals to decide our controversies of a justfiable nature; we cannot in deference to our historic policy refuse to submit such cases to arbitration, and we cannot await for this purpose the perfecting of international law. These critics also ignore the enormous service that a permanent international court may render with the materials now at its command in the development of international law. If Kent had been compelled to wait for a complete American system of equity jurisprudence before a court of equity was set up to which he could give his abilities, the evolution of our equity jurisprudence would have been impossible. A permanent international tribunal can accomplish for international law in large measure what Kent, and the judges who have followed him, have achieved for the equity jurisprudence of the United States.

Who is more entitled to honor than the incorruptible, learned, industrious, impartial judge? Amid the play of favoritism, the abuses of administrative discretion, the compromises of legislative halls, amid chicanery and dishonesty, disrespect of law and efforts to subvert its enforcement, he stands forth, dependable and steadfast, alike to the rich and poor, weak and strong, the righteous and courageous judge, the fit representative of democracy commanding its best talent for the performance of its highest function.

It was this character which ennobled the offices which he held, which enabled him to accomplish his great tasks, and which will cause to be held in fadeless honor the name and service of James Kent.

REVIEW OF RECENT SUPREME COURT DECISIONS

Transportation of Intoxicating Liquors by Foreign and Domestic Vessels Under Eighteenth Amendment and Volstead Act—Leasing Certain Storage or Sales Devices Below Cost Not Unfair Competition—Liability of Railroad Under Government Operation for Attorney's Statutory Lien—Garnishment of Railroad Property Under Federal Control—Statute Conditioning Mortgage Foreclosure Does Not Impair Obligation of Contract—Trade Marks—Curative Acts

By Edgar Bronson Tolman

Prohibition

The Eighteenth Amendment and the Volstead Act make it unlawful for any ship, domestic or foreign, to transport intoxicating liquors within territorial waters of the United States, but not for domestic ships to carry such liquors when without those waters.

Cunard Steamship Co., Ltd., et al. v. *Mellon,* Adv. Ops. 552, Sup. Ct. Rep. 504.

On October 6, 1922, the Attorney General gave the opinion which attracted such widespread attention and comment as to the effect of the Eighteenth Amendment and the Volstead Act on liquors on shipboard. This opinion advised that it was unlawful for ships, domestic or foreign, to carry into territorial waters of the United States, or to transport while within such waters, intoxicating liquors, and likewise unlawful for domestic ships to carry such liquors while in any waters. The administration took steps to apply the Volstead Act as thus construed, and thereupon certain steamship companies, ten foreign and two domestic, brought suit to enjoin the threatened application to them and their ships. The bills set up that all the ships had been carrying such liquors as part of sea stores, and as to certain of the foreign ships it appeared that the laws of their countries required such liquors to be carried and served to crews. The District Court for the Southern District of New York dismissed all the bills. Upon appeal to the Supreme Court the decrees were affirmed as to the suits brought by foreign companies, but reversed as to those brought by domestic corporations.

Mr. Justice Van Devanter delivered the opinion of the Court. After reviewing the facts he turned his attention to the language of the Amendment, and said:

> There is no controversy here as to what constitutes intoxicating liquors for beverage purposes; but opposing contentions are made respecting what is comprehended in the terms "transportation," "importation" and "territory."
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> Some of the contentions ascribe a technical meaning to the words "transportation" and "importation." We think they are to be taken in their ordinary sense, for it better comports with the object to be attained. In that sense transportation comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire, or by one for another nor that it be incidental to a transfer of the possession of title. If one carries in his own conveyance for his own purposes it is transportation no less than when a public carrier at the instance of a consignor carries and delivers to a consignee for a stipulated charge. See United States v. Simpson, 252 U. S. 465. Importation, in a like sense, consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.
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> Various meanings are sought to be attributed to the term "territory" in the phrase "the United States and all territory subject to the jurisdiction thereof." We are of opinion that it means the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power. The immediate context and the purport of the entire section show that the term is used in a physical and not a metaphorical sense,—that it refers to areas or districts having fixity of location and recognized boundaries.

This definite area was, he said, bounded by the three-mile limit. The learned Justice continued:

> The defendants contend that the Amendment also covers domestic merchant ships outside the waters of the United States, whether on the high seas or in foreign waters. But it does not say so, and what it does say shows, as we have indicated, that it is confined to the physical territory of the United States. In support of their contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor (citing authorities). The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty (citing cases). It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign.

But as to foreign ships within our waters, the conclusion was different:

> A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion.

The learned Justice quoted Chief Justice Marshall on this point, and cited numerous cases. He then turned his attention to the National Prohibition Act. He observed that

> As originally enacted the Act did not in terms define its territorial field, but a supplemental provision afterwards enacted declares that it "shall apply not only to the United States but to all territory subject to its jurisdiction," which means that its field coincides with that of the Eighteenth Amendment. There is in the Act no provision making it applicable to domestic merchant ships when outside the waters of the United States, nor any provision making it inapplicable to merchant ships, either domestic or foreign, when within those waters, save in the Panama Canal.

With regard to the Canal Zone exception, he said:

> Of course the exception shows that Congress, for reasons appealing to its judgment, has refrained from attaching any penalty or forfeiture to the transportation of liquor while "in transit through the Panama Canal or on the Panama Railroad." Beyond this it has no bearing here, save as it serves to show that where in

other provisions no exception is made in respect of merchant ships, either domestic or foreign, within the waters of the United States, none is intended.

His conclusion was thus expressed:

Examining the Act as a whole, we think it shows very plainly, first, that it is intended to be operative throughout the territorial limits of the United States, with the single exception stated in the Canal Zone provision; secondly, that it is not intended to aply to domestic vessels when outside the territorial waters of the United States, and, thirdly, that it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters, save as the Panama Canal Zone exception provides otherwise.

In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them. (Citing case.) But we do mean that the National Prohibition Act discloses that it is intended only to enforce the Eighteenth Amendment and limits its field of operations, like that of the Amendment, to the territorial limits of the United States.

The learned Justice was of the opinion that it was of no importance that the liquors carried were sea stores, and that such stores had long been carried and recognized as proper, and quoted from Grogan v. Walker & Sons, 259 U. S. 80, as to the sweeping effect of the Amendment.

Mr. Justice McReynolds dissented but wrote no opinion. Mr. Justice Sutherland dissented as regards foreign ships. He expressed his dissent in an opinion containing the following excerpts:

The general rule of international law is that a foreign ship is so far identified with the country to which it belongs that its internal affairs, whose effect is confined to the ship, ordinarily are not subjected to interference at the hands of another state in whose ports it is temporarily present. . . . With great deference to the contrary conclusion of the Court, due regard for the principles of international comity, which exist between friendly nations, in my opinion, forbids the construction of the Eighteenth Amendment and of the Act which the present decision advances. Moreover, the Eighteenth Amendment, it must not be forgotten, confers concurrent power of enforcement upon the several States, and it follows that if the General Government possesses the power here claimed for it under that Amendment, the several States within their respective boundaries, possess the same power. It does not seem possible to me that Congress, in submitting the Amendment or the several States in adopting it, could have intended to vest in the various seaboard States a power so intimately connected with our foreign relations and whose exercise might result in international confusion and embarrassment.

Mr. George W. Wickersham argued the case for appellants in 659, 660, 661, 662, 666, 667, 668, 669, 670 and 678, Mr. Cletus Keating for appellant in 693 and Mr. Reid L. Carr for appellants in 694. Solicitor General Beck and Assistant Attorney General Willebrandt argued the cases for appellees.

Unfair Competition.—Clayton Act

The practice of leasing storage or sales devices below cost on condition they are used only with the products sold by the lessor, does not constitute unfair competition or violate the Clayton Act.

Federal Trade Commission v. *Sinclair Refining Co.*, Adv. Ops., 483 Sup. Ct. Rep. 450.

The Federal Trade Commission instituted proceedings against thirty or more refiners and wholesalers of petroleum products, charging them with a course of conduct amounting to violations of both the Federal Trade Commission Act and the Clayton Act. The challenged practices varied somewhat in the case of the various defendants, but their essential nature may be described as follows: The wholesaler of lubricating oil and gasoline loaned or leased to retailers' tanks and pumps for the storage and marketing of these products. Ordinarily the wholesaler was not the manufacturer of these devices, and he leased them to the retailer often at less than cost. But in doing so the retailer was caused to sign a contract whereby it was provided that he should use the devices only in connection with gasoline and oil supplied by the wholesaler, the lease to terminate upon a violation of this clause. As the business of most retailers did not permit maintaining more than one device, other petroleum wholesalers not supplying devices by this scheme suffered a great disadvantage, and manufacturers of the machines could not sell them to retailers of oil already so cheaply supplied.

The Commission found that these methods, dealing with articles moving in interstate commerce, violated both Acts, and ordered the wholesalers to desist from the practices. The matter came to the Supreme Court from the Circuit Court of Appeals for the Seventh and Third Circuits, where the orders of the Commission had in each case been held invalid, and the decrees were affirmed.

Mr. Justice McReynolds delivered the opinion of the Court. After an extensive review of the facts, he said:

Respondent's written contract does not undertake to limit the lessee's right to use or deal in the goods of a competitor of the lessor, but leaves him free to follow his own judgment. It is not properly described by the complaint and is not within the letter of the Clayton Act. But counsel for the Commission insist that inasmuch as lessees generally—except garage men in the larger places—will not encumber themselves with more than one equipment, the practical effect of the restrictive covenant is to confine most dealers to the products of their lessors; and we are asked to hold that, read in the light of these facts, the contract falls within the condemnation of the statute.

The Commission relied on recent cases to the effect that the practical effect of these agreements was to prevent the retailer from using the devices of a competitor. The learned Justice said:

There is no covenant in the present contract which obligates the lessee not to sell the goods of another; and its language cannot be so construed. Neither the findings nor the evidence show circumstances similar to those surrounding the "tying" covenants of the Shoe Machinery Company. Many competitors seek to sell excellent brands of gasoline and no one of them is essential to the retail business. The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline, with the pump or he cannot use the lessor's equipment for dispensing without the pump, and many competitors seek to supply his needs.

As to the question of whether these practices violated the Federal Trade Commission Act, he said in part:

The devices are not expensive—$300 to $500—can be purchased readily of makers and, while convenient, they are not essential. The contract, open and fair upon its face, provides an unconstrained recipient with free receptacle and pump for storing, dispensing, advertising and protecting the lessor's brand. The stuff is highly inflammable and the method of handling it is important to the refiner. He is also vitally interested in putting his brand within easy reach of consumers with ample assurance of its genuineness. No

purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice will be unduly to lessen competition.

The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs.

Argued for petitioner by Adrien F. Busick and Eugene W. Burr; for respondents in separate cases by Roy T. Osborn, James H. Hayes, R. L. Batts and Charles D. Chamberlin.

Carriers.—Government Operation

A provision in an interstate ' .l of lading limiting the time within which suit may be orought is not affected by the limitations section in the Transportation Act.

Ellis et al. v. *Davis,* Adv. Ops. 262. Sup. Ct. Rep. 243.

Suit was brought for damages incurred through loss of goods carried by the A., B. and A. Railroad, while that line was under Federal control. The bill of lading required such a suit to be brought within two years and one day from the date of delivery or of a reasonable time for delivery. The plaintiffs did not bring their action within this time but contended that the contract provision was overridden by Section 206(a) of the Transportation Act of 1920, giving actions in cases like this against an agent designated by the President, and providing that they may be brought within the periods of limitation prescribed by statutes, but not later than two years from the date of passage of the Act. The District court dismissed the petition on demurrer, and the judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit and on writ of error by the Supreme Court.

Mr. Justice Holmes delivered the opinion of the Court. He said:

> The contention is supported with some ingenuity but we think it enough to observe that the general purpose was to limit not to extend rights of action and that we cannot suppose that it was intended to invalidate existing contracts good when made. (Citing cases.) In our opinion this contract was good when made. The time allowed was reasonable. . . . The statutes of the States where the goods were shipped and the suit was brought do not affect the contract, and the reasonableness of the limitation is a matter of law, (citing case), so that the bringing of a previous suit, alleged in the declaration, does not save the case.

The case was argued by Mr. Edgar Watkins for the claimants and by Mr. Walter T. Colquitt for the Federal agent.

Carriers.—Government Operation

A railroad under Federal operation at the time of the negligent killing of an employe is not liable to claimant's attorney under a state statute giving the attorney a lien on the proceeds of settlement.

Wabash Ry. Co. v. *Elliott,* Adv. Ops. 491, Sup. Ct. Rep. 406.

While the road of the Wabash Railway Company was under government control, one of its employees was killed under circumstances indicating the liability of the operator of the line. The administratrix of deceased entered into a contract with Elliott, an attorney, to prosecute her claim and receive one-half of all moneys received. Elliott served notice of this contract upon an agent of the company in accordance with a Missouri statute, giving such an attorney a lien upon the proceeds of settlement made by the claimant without the consent of the attorney. He then instituted suit against the railroad. Without his consent, while the suit was pending, the administratrix compromised her claim with the Director General, and the Director General filed a stipulation dismissing the suit.

Elliott sued the company, and the Director General in a Missouri court and obtained a judgment against the company. The company exhausted its avenues of appeal within the state, and brought the case by writ of certiorari to the Supreme Court of the United States. That court held that the trial court erred in refusing to direct a finding for the company, and reversed the judgment.

Mr. Justice Van Devanter delivered the opinion of the Court. He said in part:

> The courts below apparently assumed that the claim agent who effected the compromise and settlement represented the company as well as the Director General; but the assumption was wholly inadmissable. The evidence was directly and positively to the contrary. The claim agent had been in the company's service prior to the Federal control, but during that control was only in the service of the Director General. The payment to the administratrix was made by a check drawn by the Director General on funds of the United States Railroad Administration and the receipt taken from her recited that the payment was by the Director General. Indeed, so far as appeared, the company did not know of the compromise and settlement until after Elliott's proceeding was begun.
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> To sustain its asserted freedom from liability in such circumstances the company relied particularly on Para. 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, and General Order No. 50 by the Director General of Railroads, U. S. R. R. Administration Bulletin No. 4 (Revised), p. 334. That statute and order were considered at length in Missouri Pacific R. R. Co. v. Ault, supra, and were there construed as contemplating and intending that rights of action arising out of acts or omissions occurring in the course of the Federal control of a railroad should be against the Director General and not the company owning the road. (Citing cases.)
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> Thus whatever claim the administratrix had for Walker's injury and death was against the Director General, not the company. Elliott's lien, if he had one, was on that claim. The settlement of the claim was strictly an act of the Director General done in the course of the Federal control. No liability could attach to the company for that act consistently with the Federal statute and order just cited.

The case was argued by Mr. Frederic D. McKenney for the railroad company and by Mr. Martin J. O'Donnell for Elliott.

Carriers—Government Operation, Garnishment

The Federal statute providing that no process shall be levied against property under Federal control prohibits the garnishment of a debt of one railroad company to another to secure a claim which arose before Federal control.

Davis v. *L. N. Dantzler Lumber Co.,* Adv. Ops. 387, Sup. Ct. Rep. 349.

The Lumber Company filed a bill for attachment under the Mississippi law against the Texas and Pacific Railway Company, a non-resident, to obtain satisfaction of its claim for damages, and garnished certain creditors of this railroad, among them the Mobile and Ohio Railroad Company. The claim had arisen before the road had been taken over by the government. The Mobile and Ohio answered admitting that it was in-

debted to the Texas and Pacific, but contended that it was not liable as garnishee because it was under Federal control, and set up the executive order and the Congressional Act providing that no process, mesne or final, should be levied against any property under Federal control. A decree pro confesso was entered against the Texas and Pacific. Upon the hearing on the decree, the court granted a motion to discharge the Mobile and Ohio as garnishee, and this dismissal was reversed by the Supreme Court of Mississippi which concluded that the garnishment proceeding was commenced by original process, not within the prohibition of the statute.

When the case was again in the trial court the Director General filed an answer setting up the Federal operation of the road, but denying that the obligation due "from the Director General on account of his operation of the Mobile and Ohio Railroad to the Director General on account of his operation of the Texas and Pacific Railroad" was a debt subject to garnishment. The trial court struck out the answer and entered a money decree against the Mobile and Ohio Railroad Company. On appeal to the Supreme Court of the state, the Director General was substituted as defendant and a decree entered against him in place of the Mobile and Ohio. On writ of certiorari, this decree was reversed by the Supreme Court of the United States.

Mr. Justice McKenna delivered the opinion of the Court. The Supreme Court of Mississippi had relied on the case of Missouri Pacific Railroad Company v. Ault, 256 U. S. 554, and had taken the position that the Director General could not come into the case to raise a Federal question and then deny liability on the merits. The learned Justice said:

> The view is partial and overlooks antagonistic things—overlooks that the Mobile and Ohio Railroad Company was made a defendant through garnishment, attempting thereby to defeat the provision of the Federal Control Act which provides "no process Mesne or final, shall be levied against any property under such Federal control." And the prohibition was necessary to the unity and effectiveness of control in the President and, under him, in the Director General. Such is the ruling in the Ault case where it is decided that the railroad systems could be "dealt with as active responsible parties, answerable for their own wrongs," but it was also decided that "levy or execution upon their property was precluded as inconsistent with the Government's needs." "Thus, under Sec. 10," is the declaration, "If the cause of action arose prior to Government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the Government, save from the immunity of physical property from levy. . . ."
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> To repeat, the right of suit against the carriers was decided, but there was also decided the exemption of their property from levy or execution. The garnishment proceedings against the Mobile and Ohio Railroad Company were an infraction of the exemption—an infringement of the prohibition of the proclamation of the President and congressional enactments. It is not excluded from the condemnation because it is a procedure under the statutes of the State.
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> The defense was seasonably made. It is to be remembered that the Mobile and Ohio Railroad Company, immediately in the proceeding against it, attacked the jurisdiction of the Court and adduced the proclamation of the President exempting the property of any of the railroad systems of the United States from process, and also adduced Section 10. The attack was successful in the trial court. It was declared impotent by the Supreme Court of the State and the case was remanded for further proceedings in accordance with the law of the State, that is, in execution of the garnishment proceedings against the indebtedness of the Mobile and Ohio Railroad Company to the Texas and Pacific Railroad Company. The Director General then entered the case and took up the contest commenced by the Mobile and Ohio Railroad Company against the law of the State and the jurisdiction of the State court to enforce it.
>
> This the Director General did, and nothing more. In other words, the Director General contested the jurisdiction and power of the Court to proceed against property under the control of the United States, and which the proclamation of the President and the statutes of the United States had exempted from state control.

The case was argued by Mr. R. C. Beckett for the Director General, and by Mr. W. A. White for the Lumber Company.

Mortgages—Contract Clauses

A statute making the validity of the foreclosure of a mortgage conditional upon the filing of an affidavit by the mortgagee within three months after the completion of the foreclosure, does not impair the obligation of the mortgage contract.

Conley v. *Barton,* Adv. Ops. 268, Sup. Ct. Rep. 238.

In 1905 Barton as mortgagor executed a mortgage containing a provision that the right to redeem should be forever foreclosed one year after the commencement of foreclosure by taking possession or by any other method recognized by law. In 1917 the Maine legislature passed a statute providing that possession so obtained and continued for one year should forever foreclose the right of redemption on condition the mortgagee or holder of record executed and recorded within three months after the expiration of the mortgage an affidavit setting out the facts. In 1919 a breach of the mortgage was committed, and the holder foreclosed by taking possession and recording a certificate, as provided by the laws of Maine. Barton brought suit to redeem, and in his amended bill set up the lapse of fifteen months from the date of taking possession and the fact that no affidavit had been recorded. To this plea defendant answered that the Maine statute had no application to plaintiff's right, and that if it had, it extended the foreclosure period and impaired the obligation of the mortgage contract in contravention to the Constitution of the United States. The trial court, and the Supreme Court of Maine, construed the Act to apply to foreclosures of mortgages executed prior to its passage, and held that the statute did not extend the foreclosure period, and was valid. The case came on writ of error to the Supreme Court of the United States where the decree was affirmed.

Mr. Justice McKenna delivered the opinion of the Court. He said:

> It is recognized that the legislature may modify or change existing remedies or prescribe new modes of procedure without impairing the obligation of contracts if a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract (citing two cases). These cases are complementary. In the first, an alteration of the remedy was sustained; in the second, the remedy was adjudged so intimate in its relation to the contract as to be within its obligation and immunity from change. The first is the reliance of defendant in error; the second of plaintiff in error. Our inquiry, therefore, is, which determines the case at bar?
>
> The statute in execution of the purpose of the State, enjoins a duty upon the mortgagee, the effect of the non-performance of which the mortgagor may avail of. In other words, the duty not performed, the attempt at foreclosure is null and void, and necessarily, therefore, it is no impediment to redemption of the mortgage by the mortgagor. It does not withhold

possession of the premises for a single day, nor does it defeat the efficacy of possession as foreclosure. And we have seen, the Supreme Court of the State passing upon it, decided that compliance with it does not involve any delay. The mortgagee may perform the condition at once or at his option any time within three months. It, therefore, only imposes a condition, easily complied with, which the law, for its purposes, requires. And the condition was required and its purpose declared long before plaintiff in error's attempt at foreclosure.

The case was argued by Messrs. Harry A. Hegarty and James B. Flynn for defendant (plaintiff in error) and by Mr. Frank H. Haskell for Barton.

Receivers—Federal Jurisdiction

Where a state court has taken possession of the assets of a company, although for purposes of limited relief only, a federal court may not take possession of the property, or control the future proceedings of the state court.

In a suit by a creditor to appoint a receiver the amount in controversy is the amount of his claim, and not the assets or the liabilities of the company.

Section 56 of the Judicial Code extending the operation of a receivership to other districts of the same circuit, does not apply to receiverships of ordinary insurance companies.

Lion Bonding & Surety Co. v. Karatz, Adv. Ops. 533, Sup. Ct. Rep. 480.

The Lion Bonding & Surety Company, a Nebraska Insurance corporation, became insolvent. In accordance with the laws of the state, the state Department of Trade and Commerce applied to the District Court of Douglas County, Nebraska, for an order directing it to take possession of the property of the company and to conduct its business, and for other relief. The company admitted the material allegations of the bill, the order was accordingly entered on April 12, 1921, and the Department took possession, subject to the orders of the state court.

The company had been admitted to do business in Minnesota. On May 2, 1921, Karatz, an unsecured simple contract creditor, filed a bill in the federal court for the District of Minnesota, alleging a claim for $2,100, and the insolvency of the company, but not the Nebraska proceedings. The federal court appointed Hertz and Levin receivers for all property wherever situated, and authorized them to apply to any other District Court in aid of the order. Motions by the company to dismiss the Karatz bill and to discharge the receivers were made and denied. On May 11, 1921, Hertz and Levin filed certified copies of the bill and order of appointment, under Section 56 of the Judicial Code, with the federal district courts for Nebraska and other states. On May 28, 1921, the Nebraska Department of Trade and Commerce obtained an order in the state court directing it to liquidate the company.

At this crisis of conflicting authority the Minnesota receivers filed a bill in the Federal District Court for Nebraska, Omaha Division, to enjoin the Department from interfering with the Minnesota receivers' possession and control. This suit and that instituted by Karatz were heard at the same time by the Circuit Court of Appeals for the Eight Circuit, and that court upheld the Minnesota receivers, affirming the order appointing them, and in the Nebraska injunction suit reversing the decree of the lower court dismissing the bill. The cases were brought to the Supreme Court on writs of certiorari, and the decrees of the Circuit Court of Appeals reversed.

Mr. Justice Brandeis delivered the opinion of the Court. He held first that the motion to dismiss the Karatz bill should have been granted because, having been brought by an unsecured simple contract creditor, there was want of equity, and also because the federal court could not take jurisdiction. He said:

> The facts specifically stated show that the amount in controversy was less than $3,000. Plaintiff's claim against the company was $2,100. He prayed that this debt be declared a first lien on the assets within the State. His only interest was to have that debt paid. The amount of the corporation's assets, either within or without the State, is of no legal significance in this connection. Nor is the amount of its debts to others. The case is not of that class where the amount in controversy is measured by the value of the property involved in the litigation.

He then decided that the motion to dismiss the bill in which Hertz and Levin were appointed receivers should have been granted:

> Hertz and Levin were not appointed ancillary receivers for Nebraska. They sue in the Nebraska district as Minnesota receivers, relying upon Section 56 of the Judicial Code. That section, by its terms, applies only, where in a suit "in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit." It relates to those cases where the fixed property is a unit, extending into several States, like interstate railroads and pipe lines. (Citing cases.) It cannot be assumed that the assets of an insurance company are of that character. Those of this company, within the Minnesota district, specifically described in the Karatz bill were alleged to consist of money and credits. The description of the property in Nebraska, given in the Hertz bill, is "cash, mortgages and other securities, bills receivable, real estates, stocks and bonds." The provisions of Section 56 extending the operation of a receivership to other districts of the same judicial circuit, were, therefore, inapplicable to this case.

He continued:

> Moreover, even if the federal court for Minnesota would have had jurisdiction to appoint the receivers, and these receivers had secured ancillary appointment in the Nebraska district, the Hertz bill should still have been dismissed; because the property was then in the possession of the state court. What the federal court undertook to do was not to adjudicate rights in personam (as the state court did in Kline v. Burke Construction Co., No. 81, decided November 20, 1922), but to take the *res* out of the possession and control of the state court, and to enjoin all action on its part, except as directed by the federal court for Minnesota. It sought to do this although the state court alone had jurisdiction of the parties and of the subject matter, at the time when the proceeding befor it was begun; at the time its decree directing the Department to take possession was entered; and at the time possession was taken thereunder. Moreover, the proceeding in the state court was confessedly an appropriate one; the possession taken was actual; and it has been continuous. All this occurred before any suit was begun in any federal court. The federal court did not seek to gain possession and control of the Nebraska property until three months after entry of the decree of the state court directing the Department (which has possession of the *res*) to proceed with the liquidation. The case is, thus, free of those features which sometimes create difficulty in determining conflicts between courts of concurrent jurisdiction.
>
> Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. (Citing cases.) Possession of the *res* disables other courts of coordinate jurisdiction from exercising any power over it. (Citing cases.) The court which first acquired jurisdiction through possession of the property is vested, while it

holds possession, with the power to hear and determine all controversies relating thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other court to interfere with such possession and jurisdiction.

He further held against the contention that the possession taken by the Nebraska Department was temporary, and that before it had taken definite control by acting to liquidate the business, the Minnesota receivers had acquired a superior right of possession.

Mr. Halleck P. Rose argued the case for petitioners and Mr. Bruce W. Sanborn for respondents.

Trademarks.—Infringement

The rights of the purchaser of the good will and trademarks, registered here, of the foreign manufacturers of a commodity, are infringed by the sale by another of the article imported and sold in the original packages bearing those trade marks.

Bourjois and Co. v. *Katzel,* Adv. Ops. 263, Sup. Ct. Rep. 244.

A French company, a manufacturer of face powder, sold to the plaintiff its business in the United States including its good will and its trade marks registered here. The plaintiff registered the marks again, imported the powder from France, and packed and sold it here in boxes bearing labels substantially the same as those used in France, but indicating that the powder was packed in this country. After the plaintiff had built up a good business, the defendant imported the powder from France and sold it in this country in the original boxes bearing the same marks. The plaintiff's rights were thus clearly infringed, unless, as contended by the defendant, the fact that the powder and boxes were the genuine product of the French manufacturer, made the sale rightful. An order enjoining the infringement was entered by the District Court, but was reversed by the Circuit Court of Appeals for the Second Circuit. On certiorari, this decree was reversed by the Supreme Court.

Mr. Justice Holmes delivered the opinion of the Court. He said:

> We are of opinion that the plaintiff's rights are infringed. After the sale the French manufacturers could not have come to the United States and have used their old marks in competition with the plaintiff. That plainly follows from the statute authorizing assignments. . . . If for the purpose of evading the effect of the transfer it had arranged with the defendant that she should sell with the old label, we suppose that no one would doubt that the contrivance must fail. There is no such conspiracy here, but apart from the opening of a door to one, the vendors could not convey their goods free from the restriction to which the vendors were subject. Ownership of the goods does not carry the right to sell them with a specific mark. It does not necessarily carry the right to sell them at all in a given place. If the goods were patented in the United States a dealer who lawfully bought similar goods abroad from one who had a right to make and sell them there could not sell them in the United States. Boesch vs. Griaff, 133 U. S. 697. The monopoly in that case is more extensive, but we see no sufficient reason for holding that the monopoly of a trade mark, so far as it goes, is less complete. It deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care. It is said that the trade mark here is that of the French house and truly indicates the origin of the goods. But that is not accurate. It is the trade mark of the plaintiff only in the United States and indicates in law, and, it is found, by public understanding that the goods come from the plaintiff although not made by it. It was sold and could only be sold with the good will of the business that the plaintiff bought.

The case was argued by Mr. Hans von Briesen for plaintiff (petitioner) and by Mr. John B. Doyle for defendant.

Vested Rights.—Curative Acts

A judgment declaring a public right may be annulled by subsequent legislation, and hence a legislature may validate a consolidated school-district after it has been declared void by the courts.

Hodges et al. v. Snyder et al, Adv. Ops. 458, Sup. Ct. Rep. 435.

A taxpayer's suit was brought in a South Dakota court challenging the validity of a consolidated school district formed by the merger of smaller districts. The Supreme Court of that state, reversing the lower court, held the merger void and remanded the cause. The legislature thereupon passed an act validating the proceedings under which the district had been formed as of the date of the organization. Before this act went into effect the lower court entered an injunction in conformity with the mandate. After the act went into effect, defendants (members of the district board) moved to set aside the injunction. On a second appeal the state Supreme Court held that the curative act had validated the defective organization, and directed that the judgment as to the injunction, but not as to costs, be set aside. The case was brought to the Supreme Court of the United States, where the judgment was affirmed.

Mr. Justice Sanford delivered the opinion of the Court. After disposing of a point of practice, he stated the principal question as follows:

> Their sole contention is that as the curative act was not enacted until after the Supreme Court had decided, on the first appeal, that the consolidated district was invalid, and did not go into effect until after the Circuit Court had entered judgment adjudging its invalidity and enjoining the defendants from further conducting its affairs, it deprived them, as applied by the Supreme Court, without due process, of the private property rights which had been vested in them under these adjudications.

It was true, the learned Justice said, citing cases, that private rights which have been vested by a judgment cannot be taken away by subsequent legislation. But he continued:

> This rule, however, as held in the Wheeling Bridge Case, does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away . . .
>
> In the Wheeling Bridge Case, as in the Clinton Bridge Case, the public right involved was that of abating an obstruction to the navigation of a river. The right involved in the present suit, of enjoining the maintenance of an illegal school district and the issuance of its bonds, is likewise a public right shared by the plaintiffs with all other resident taxpayers. And while in the Wheeling Bridge Case the bill was filed by the State, although partly in its proprietary capacity as the owner of certain canals and railways (9 How. 647, 648), the doctrine that a judgment declaring a public right may be annulled by subsequent legislation, applies with like force in the present suit, although brought by individuals primarily for their own benefit; the right involved and adjudged, in the one case as in the other, being public, and not private.

The case was argued by Mr. Samuel Herrick for the taxpayers and by Messrs. Max Royhl and T. H. Hull for the school board.

AMERICAN LAW INSTITUTE BEGINS ITS WORK

Council Decides to Begin Restatement of Law of Contracts, Torts, Agency and Conflict of Laws—Reporters Appointed to Prepare Tentative Drafts—Survey and Statement on Defects in Criminal Justice Provided for—Report on Practicability of Restating Law of Business Association to Be Presented

By William Draper Lewis
Director of the American Law Institute

THE generous gift of the Carnegie Corporation to The American Law Institute, which insures the Institute an income of $110,000 a year for nearly ten years, has enabled the Council of the Institute to begin the proposed restatement of the law. An important meeting of the Council was held at the Association of the Bar of the City of New York, on May 19th. Eighteen of the twenty-one members were present, and the Report on Organization, Work and Budget, submitted by the Executive Committee, was considered and acted upon.

The Council decided to begin a restatement of the law of Contracts, Torts, Agency, and Conflict of Laws. In each topic responsibility for the preparation of a tentative draft will rest on a reporter. The reporters will have assistants and the advice of other experts.

The Council appointed Samuel Williston of the Harvard University Law School reporter for Contracts; Francis H. Bohlen of the Law School of the University of Pennsylvania reporter for Torts; Floyd R. Mechem of the Law School of the University of Chicago reporter for Agency; and Joseph H. Beale of the Harvard University Law School reporter for Conflict of Laws. Work on Contracts, Torts, and Conflict of Laws will begin at once; work on Agency will begin in September.

Each reporter is the outstanding authority on the law of his topic. Each is a lawyer of recognized constructive legal ability, and has devoted the best part of his professional life, though unconsciously, to prepare for the work which the Institute is now asking him to do.

The law of Contracts has recently been exhaustively set forth by Mr. Williston in a treatise, the result of more than twenty years unremitting labor. Mr. Mechem has taught Agency for thirty-five years. He has written a book on the subject to which the courts accord an authority unexcelled, if indeed equalled, by that now accorded to any other legal treatise. Mr. Bohlen has spent nearly twenty-five years in the study of the law of Torts, and his suggestive and constructive articles dealing with many of the fundamental problems of that topic have had a distinctive influence on modern judicial decisions. For many years Mr. Beale has been working on a treatise dealing with the intricate and much disputed topic, Conflict of Laws, and his notes and manuscript will form the material from which will be written the treatise accompanying the principles and rules of law set forth in the restatement.

The statement of the law of any topic, however, will not be the work of any one man. While the reporter will be primarily responsible for the production of the first and subsequent drafts, he will have the advantage of the advice and criticism of other experts. No restatement will be submitted to the Institute by the Council until it has been subjected to a searching examination by a committee of experts.

It is recognized that the Council's first problem is to determine the necessary details with respect to the form of the restatement, the classification of topics and terminology. On June 25, 26 and 27, there will be held in Cambridge, Massachusetts, a conference of all those engaged in the work, at which model forms of restatement prepared by the reporters and by the director will be considered and discussed. Mr. Bohlen will also prepare for this conference an analysis of three possible methods of restatement of the law of Torts. For the benefit of the Committee on the Preparation of a Survey and Statement of the Defects in Criminal Law (referred to below), there will be a meeting of specially invited experts on that subject. While the Council have not selected committees and experts on any subject, they have invited to the Cambridge conference Arthur L. Corbin of Yale University; William H. Page of the University of Wisconsin, and Herman Oliphant of Columbia University, to confer with Mr. Williston on Contracts; and Ernest G. Lorenzen of Yale University; Herbert F. Goodrich of the University of Michigan; J. G. Buchanan of Pittsburgh, and Monte Lemann of New Orleans to confer with Mr. Beale on Conflict of Laws.

Mr. Williston will prepare during the summer a draft of a restatement of the law relating to the formation of contracts. Mr. Beale will prepare a draft of a restatement of so much of Conflict of Laws as relates to Domicile and Jurisdiction, and an outline of his proposed treatment of the entire subject. Roscoe Pound, Dean of the Harvard University Law School, who has been appointed special advisor on classification and terminology, will prepare a preliminary report during the summer, and this report, as well as the results of the summer work of the reporters, will be made the subjects of another conference in the fall.

The Council of the Institute, besides taking the action necessary to begin work on the topics referred to, has provided for the preparation of a survey and statement on Defects in Criminal Justice, and for a report on the practicability of a restatement of the law of Business Associations.

The survey and statement on Defects in Criminal Justice will be made by a committee composed of ex-Governor Herbert S. Hadley, John G. Milburn, and William E. Mikell. The primary object of the survey is to give to the Council such an analysis of the causes of existing defects in criminal

law and administration as will make possible an intelligent estimate of the results which could reasonably be expected from a restatement of substantive and procedural criminal law. The survey and statement will also point out the other directions in which efforts for improvement in the administration of criminal justice should be applied. It will thus serve as a permanent guide to agencies other than the Institute for the improvement of existing legal conditions and to those willing to give financial assistance to such agencies. As it is not intended that the members of the committee shall do more than make an examination of the results of the investigations that have already been made by others, with the object of presenting a clear analytical statement of the subject, it is expected that the report will be ready for submission to the Council by January 1.

The responsibility for preparing the preliminary draft of the report on the practicability of a restatement of the law of Business Associations has been placed on me. When the preliminary draft of the first part of the report is prepared, it will be placed before a group of experts in the topic for criticism and suggestion. The term "business associations" includes corporations, partnerships, limited partnerships, and all other associations of two or more persons organized to carry on as co-owners a business for profit.

Under the by-laws of the Institute, it is the duty of the Council to increase its own membership from twenty-one to thirty-three. The principal object of this increase is to make the membership of the Council represent to a greater degree the legal profession in all parts of the country. This duty is difficult and delicate. The Council has appointed a committee to receive nominations and to report to the next meeting of the Council which will be held at the end of August in Minneapolis, at the time of the annual meeting of The American Bar Association. The Council has also directed a committee to report upon the principles which should regulate the number and selection of new members of the Institute.

The question of the permanent location of the Institute was not discussed at the meeting on May 19th. There is a general feeling among the members of the Council that it would be unwise to select a permanent home for the Institute now. The immediate task is to get the work of the Institute started. Experience will show the proper character and location of the permanent headquarters. Accordingly, the only action taken by the Council in the matter was to direct the President to ask the authorities of the University of Pennsylvania, in Philadelphia, to consider the allotment of temporary quarters in the Law School to the Director and his staff.

I believe that all the members of the Council left the meeting with the feeling that an important milestone in the life of the Institute has been passed. The initial plan of work has been adopted and put into operation, and there is a reasonable prospect for the accomplishment of definite work during the summer and fall. It will not be possible, of course, to place before the Institute at its meeting next winter any final draft of a restatement of the whole, or even of part, of any topic. There will, however, be much that can be considered which will make the meeting one of interest and importance. While prophecies as to time, in a work of this character, are usually unwise, it is not improbable that important portions of the law of Contracts will be ready for submission to the Institute at its meeting in the winter of 1923, and that thereafter the annual volume of the completed work will steadily increase.

Centenarian Lawyers

"Though the longevity of lawyers has become proverbial, Sir Gardner Englehart, the 'Father of the Bar,' who recently celebrated his centenary, is only the second member of the Bar to become a centenarian. Mr. W. A. G. Hake, who died in 1914 at the age of one hundred and three, was, so far as available records go, the first barrister to achieve the distinction. He was not, however, the first member of the legal profession to attain it. Mr. Richard Peter, who was in active practice as a solicitor in Launceston for seventy years, celebrated his centenary in 1909, and Mr. F. H. Janson, a member of one of the oldest firms in the City of London, and an ex-President of the Law Society, completed his one-hundredth year in 1913. There have been other men in the legal profession who have missed the distinction of being centenarians only by a year or two, most notable among them being Lord Halsbury, who died at the age of ninety-eight. Mr. Henry Griffith, who was for so long the senior Bencher of Gray's Inn, reached the same great age. And, happily, we still have with us Sir Harry Poland, who, notwithstanding his ninety-three years, continues to take a keen interest in the law and its administration."—The Law Journal, (Feb. 17).

Mr. Justice McCardie on Woman's Dress

The Canadian Bar Review (May) reprints the following extracts from the opinion of an English judge in the recent case of Callot vs. Nash (1923), a suit involving the husband's responsibility for wearing apparel supplied his wife:

> "The dress of woman has been ever the mystery and sometimes the calamity of the ages. . . . This account of the plaintiffs' is a mere fraction of the dressing debts incurred by the defendant's wife. I might well infer that it is as true in some cases to-day as it was when Ovid wrote 1,900 years ago 'Pars minima est ipsa puella sui,' that is, 'The woman is the least part of herself.' Her [Mrs. Nash's] catholicity of profusion was remarkable. She threw herself beneath the fatal curse of luxury. She forgot that ostentation is the worst form of vulgarity. She ignored the sharp menace of future penury. . . .
>
> "The defendant here was a captain in the Army, but otherwise he had no particular rank or position. The word 'captain' is not to be taken as a synonym for prodigality. It is true that the husband and wife (particularly in the early period of marriage) lived at times in fashionable hotels, and dined and danced at fashionable restaurants. I must make allowance for the irrational tyranny of social convention; I do not overlook the requirements, however foolish, of so-called fashionable society. I am willing, moreover, to recognize the tonic properties of an occasional new costume . . .
>
> "Husbands vary. Some repose on financial strength; some hover on the brink of mere indigence. Nothing was known of Captain Nash, except his address at a Paris hotel, or his address in London. He was merely one of a rapid succession of husbands. He was nothing more. He might well be as transitory as the other two. To the plaintiffs he was only an incidental male appurtenance to Mrs. Nash. . . . When I observe the consequences of Mrs. Nash's slavery to fashion, I might well apply the words of Victor Hugo in his 'Notre Dame de Paris' and say that 'fashions have done more harm than revolutions.'"

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FOUR TO FIVE DECISIONS

III

The proposal to limit the powers of the Supreme Court to declare the invalidity of acts of Congress and of state legislative bodies which are in conflict with the federal constitution, continues to attract public interest and comment.

The Chief Justice in his address at Cincinnati, commemorative of the life and judicial service of Chief Justice Chase, reminds us that this is no new proposal, but one which has been rejected more than once by the sober second thought of the American people. This notable address is printed in full on another page and will repay intent reading.

As all students of the science of government know, one of the distinguishing features of the American experiment is the division of the powers of government between three departments and the prohibition that any one of these departments invade the province of the other. It is of course inevitable in such a system of government that, notwithstanding such prohibition, conflict should arise between the departments and that when the legislative department is checked in the exercise of its will by the declaration of the judicial department that its enactment is in conflict with the constitution, the legislative department and those interested in the legislative project thus brought to no avail should seek to throw off this unwelcome restraint. This is the chief source of the present proposal and of those which our history records in early days.

Those who sincerely believe in the wisdom of the provisions of our constitution above referred to and in the maintenance of the independence of the three departments of government will find it difficult to justify the attempt on the part of one of these departments to limit the powers of another.

With this fundamental principle in mind we stated in an earlier number that such a change could not be brought about by an act of Congress but that it could only be accomplished by constitutional amendment. It has been suggested that there may be some doubt as to the correctness of this proposition because of the provisions of Section 2 of Article III of the constitution, which provides that the Supreme Court shall have Appellate jurisdiction both of law and fact "with such exceptions and under such regulations as Congress shall make."

This provision of the constitution must of course be construed in harmony with the provisions of Section 1 of Article III which vest all the judicial power of the United States in the Supreme Court and such inferior courts as Congress may establish. So construed it would be very difficult to sustain as "regulations," acts of Congress by which any part of the judicial power of the United States was divested from federal tribunals.

This debate, however, is academic. The real question is whether or not in cases regularly brought before that tribunal, in which the validity of legislative acts is assailed as in conflict with the constitution, the existing power of the Supreme Court to adjudicate upon that question shall be limited at all. If it be determined that it is wise to take from the judicial department, in any degree, power to decide this question like any other judicial question brought before it, there will then be time to determine what that limitation shall be and how it shall be made.

THE CREATIVE TASK OF COURTS

In his address at the Kent Centennial celebration, Secretary Hughes has drawn from the career of Chancellor Kent and his great influence upon the development of equity jurisprudence, an interesting analogy which he applies to the development of international law and the Permanent Court of International Justice. He says:

> A permanent international tribunal can accomplish for international law in large measure what Kent and the judges who have followed him have achieved for the equity jurisprudence of the United States.

This analogy is an instructive one and might with profit be given still broader application. While it is undoubtedly true that law came before the courts, and that the

courts were invented and established to interpret, apply and enforce the law, it is none the less true that the courts have greatly stimulated the growth of the law. In the development of law through judicial processes both the jurist and the lawyer have cooperated and it is difficult to imagine what would have been the body of our law today if there had been no courts.

One of the chief reasons for the slow development of international law is probably the fact that there has been no purely judicial body with jurisdiction to interpret and apply international law.

SOLIDARITY THROUGH SERVICE

This issue of the JOURNAL goes to nineteen thousand members of the American Bar Association. This represents an increase of over seven thousand, as compared with the total membership at the time of the St. Louis annual meeting in 1920. Comparison with other years before that date renders the growth of the Association still more striking. No prediction is ventured as to the final results of the membership campaign now in progress, but it may safely be assumed that the total just mentioned will be considerably increased.

But progress in this particular direction is by no means confined to the American Bar Association. State Bar Associations are generally reporting an increase of membership as a result of active efforts to interest lawyers in the advantages and possibilities of these organizations. And such scattered information as we have in regard to larger local bar associations shows that the same process is going on with these smaller units, which tend to become more and more the spokesmen and representatives of the entire profession in the various cities and towns.

What is the explanation of this tendency toward integration which is manifesting itself as never before in the history of this country? Perhaps the best single answer that can be given to so broad a question is that the bar is everywhere realizing its public responsibility and also realizing that this can not be discharged by individuals acting alone but requires concert and organization—"getting together" in states for purposes peculiar to that province and in the national organization for objects demanding the unity of the profession as a whole. In brief, it is a solidarity that is being achieved through service and plans for service.

SIR MATTHEW HALE'S RULES

A few of the newspaper comments on the proposed Canons of Judicial Ethics printed in the February issue of the Journal rather suggested that the formulation of a code containing so many apparently self-evident propositions was a trifle superfluous. There are plenty of answers to this, and perhaps one of the most striking is furnished by the rules for his own conduct prepared by Sir Matthew Hale, printed in the April issue.

Neither lawyer nor layman is likely to find in these rules anything to which he is not willing to yield an immediate assent. And yet this distinguished jurist found it helpful to write them down for his own guidance and to keep them constantly in mind. It was not a question of the principles being difficult, but a practical question of keeping them constantly in mind so as to render specific application quicker and easier.

While the principle of conduct may be plain, the matter of its application may be quite another thing. And unless the principle is always before the judge, the relation of a specific act to it, as coming under its scope and authority, is at least a degree, and it may be many degrees, less evident.

SIMPLE PROCEDURE AND PUBLIC INTEREST

Support is lent to the argument of Mr. Thomas W. Shelton for a simplified procedure, in the January issue of the JOURNAL, by an item from the Law Times of London of recent date. Referring to the fact that there are at least some people without personal or professional interest in the results of proceedings who read the reports of decisions in ordinary commercial and other actions, that journal says:

> "That laymen are able to enjoy the reports of our legal tribunals is another testimony to the fact that these pronouncements are nowadays comparatively free from those technicalities which at one time militated against the intelligibility of reports by others than those of the profession."

Assuredly anything which tends to direct the interest of the layman to the actual principles of the law and the mode of administering Justice in the courts is greatly to be desired. The layman has no more essential interest than the function of the courts, and the more evident and logical their processes are, the more readily he will realize it and be moved to lend them his sympathy and support.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in Current Legal Periodicals

I. Among Recent Books

LAW of Wills, Executors and Administrators, by James Schouler, LL. D., Sixth Edition by Arthur W. Blakemore, of the Boston Bar. Matthew Bender & Co., Inc., Albany, N. Y. 4 volumes, $36.00.—The last edition of this book was prepared by Mr. Schouler in 1915. This book is so widely and favorably known to the profession that nothing more than comment on the changes made by the editor of the sixth edition is necessary. In general, the arrangement of the earlier editions is preserved, as are the original author's statements of the law, which have become so widely embodied in judicial decisions. The number of cases cited has been increased from fourteen to thirty-one thousand. In addition to enlargement, other noteworthy changes in the sixth edition are indicated by the following quotations from Mr. Blakemore's preface: "Medical knowledge of mental diseases has so far advanced since Professor Schouler wrote his treatise that an entire recasting of the portion of the work on testamentary capacity has been necessary and the editor of this edition has brought the work completely in line with modern psychiatric developments through the courtesy of Dr. Thomas A. White of the Government Hospital at Washington, one of the recognized leaders in advanced study of diseases of the brain. Full directions for examination and cross-examination of witnesses and preparation of such cases for trial in the light of modern medical knowledge have also been inserted in this edition. The construction of Wills has been made a special feature by the introduction of thirty-one new chapters containing all the modern cases and the law of Estates has also been newly written with sixteen new chapters containing among other interesting features a full exposition of recent developments in the law of conditions and restraints on alienation. The Third Volume on 'Executors and Administrators' has brought this valuable work down to date and has also added to it new chapters on Rights of Beneficiaries, including a full modern treatment of the Ademption, Lapse, and Abatement of Legacies and kindred topics." The publishers have done their part in enhancing the value of this notable treatise by excellent typography, press-work and binding.

The Law of the Press, by William G. Hale, Dean of the Law School, University of Oregon. West Publishing Co., St. Paul, Minn. $3.50.—This book of some five hundred pages accrued from the author's lectures to students of Journalism, and in such schools the book will doubtless have great utility. Its scope is indicated by the following chapter headings, excluding introductory matter: Libel, Right of Privacy, Publications in Contempt of Court, Constitutional Guarantees of the Freedom of the Press and Prohibition of the Circulation of Pernicious Writings, Copyright, Rights and Duties of News-Gathering Agencies, Official and Legal Advertising and Newspaper Subscription Contracts. The method of treatment combines that of the text-book and the case-book. A concise statement of the law on each subject is followed by a number of cases well selected and edited. In the hands of a competent teacher, this book should prove of very great utility in schools of Journalism.

Classics of the Bar, Stories of the World's Great Legal Trials and a Compilation of Forensic Masterpieces, by Alvin V. Sellers. Volume VII. Classic Publishing Co., Baxley, Ga. $3.00.—The latest volume in this series contains the speech of the Earl of Strafford at his own trial, the remarks of Robert G. Ingersoll in the Russell will case, Andrew Hamilton's address to the jury in the Zenger libel case, and Henry L. Clinton's opening speech in the Brown-Davidson damage suit. The remaining two-thirds of the volume is devoted to the trial of Daniel E. Sickles, upon the charge of murder of Philip Barton Key. There are printed the speeches of Robert Ould and James M. Carlisle, for the Government, the speeches of John Graham, Edwin M. Stanton and James T. Brady, for the defense, and the instructions to the jury by Judge Thomas H. Crawford.

The Law and Its Sorrows, an Exoteric of Our Legal Wrongs, by James Hannibal Clancey, LL. B., of the Bar of Jackson, Mich. The Benton Institute, Detroit, Mich. $1.50.—This volume contains a most severe criticism of the administration of justice and a number of suggested remedies for existing evils. Fair-minded readers will recognize that many of the criticisms are amply founded on fact, while others are not so founded. They will find the reforms proposed likewise falling into the two classes, some exceedingly well considered, others scarcely calculated to carry conviction as to either their desirability or feasibility. The present widespread criticism of the work of the legal profession, whether well founded or not, is sufficiently important to justify the profession in reading this book, with the thought to glean from it such of its criticisms as are sound and such of its suggested remedies as are to be desired. It is to be regretted that so much sound criticism of the profession is interlaid with material written in a vein making a wide sympathetic reading of the book difficult. It none the less deserves such a reading.

International Society, Its Nature and Interests, by Philip Marshall Brown, Professor of International Law, Princeton University. The MacMillan Company, New York. $1.50.—Some sentences from the preface of this little book will disclose the author's approach: "Robertson of Brighton—a great idealist as well as a profound thinker—has said that: 'Society is not made by will, but by facts.' This truth has not apparently been realized by many of the recent writers on international affairs. Too often they have shown a tendency toward 'wishful thinking' in their eagerness to remould the universe 'nearer to the heart's desire.' Emotional appeals have been made to the natural idealism of men without at the same time furnishing them with the solid facts concerning international society.

Great hopes and visions of a new world order have been awakened to be followed inevitably by disillusionment and discouragement. The Press has not been equal to the demands put upon it. Much has been published as news which was sheer propaganda. So-called journals of public opinion have been more intent at times on refracting international news through the prism of a fixed policy than to encourage independent observation and discussion. No wonder under these conditions that men have become bewildered and discouraged in the face of so much turmoil and confusion of counsel! No wonder that so many intelligent and highminded students of international affairs have been at cross purposes in their arguments concerning diplomatic controversies and in particular concerning problems of world organization! They have not been able even to agree on their facts and major premises. This volume has been written, therefore, for the purpose of presenting the results of considerable study and experience by one earnest student of the problems of international society."

Democracy's International Law, by Jackson H. Ralston. John Byrne & Co., Washington, D. C. $1.50.—The author in one hundred and sixty-five pages of this book makes an earnest effort to discover for the reader "True International Law," in the face of the growing opinion that international law hitherto discussed is a body of rules having no stability. The author's thesis is that in the theory of democratic government is to be found a key to the true international law, that principle being evolved by a number of associated social units, first small, and then larger and larger social units, coming to find ways to live together. The book is a noteworthy appeal for righteousness in international relations.

Legal Medicine and Toxicology, W. B. Saunders Co., Philadelphia and London. $20.00 net.—By many specialists. Edited by Frederick Peterson, M. D., Manager Craig Colony for Epileptics; Walter S. Haines, M. D., late Professor of Chemistry, Materia Medica and Toxicology, Rush Medical College; and Ralph W. Webster, M. D., Assistant Professor Medical Jurisprudence, Rush Medical College. Second Edition. Two Octavo volumes, totalling 2,268 pages, with 334 illustrations, including 10 insets in colors.

Federalism in North America, A Comparative Study of the Institutions in The United States and Canada, by Herbert Arthur Smith, Barrister-at-Law, and Professor of Jurisprudence and Common Law in McGill University. The Chipman Law Publishing Company, Boston. $3.75.—The author does not attempt to state the facts with reference to the governmental systems of Canada and the United States, but devotes his space to an illuminating comparison of the important features of the two political structures. He says in his preface: "A few years spent in teaching law students at McGill have helped me to realize the extent to which even fairly well educated Canadian boys are ignorant of the institutions of the great country which they can actually see from the slopes of Mount Royal. I have reason to believe that the average American college student is equally ignorant of the principles of government prevailing in Canada. It is in such ignorance that much international misunderstanding is bred. To bridge this gap between the students of the two countries is work which awaits a writer of more authority and learning than I can claim. In the meantime those of us who find an absorbing interest in the study of the two great experiments in democratic government which are being worked out on this continent will be well rewarded if we can induce others to explore more thoroughly the field of political science which is roughly surveyed in the chapters that follow."

The Rise and Fall of Prohibition, by Charles Hanson Towne. The MacMillan Company, New York. $2.00.—A popular study of the status and effect of prohibition, humorous in tone, couched in satire and illustrated by cartoons drawn in the very spirit of the author's treatment. Illustrations by Peter Newell.

The Creation of the Presidency, 1775-1779, A Study in Constitutional History, by Charles C. Thach, Jr. Ph. D. Johns Hopkins Press, Baltimore. $1.50.—In this study of the office of the presidency, the partial view afforded by the catalogue of presidential powers found in the constitution and in the decisions of the United States Supreme Court is rounded out by a consideration of the political and social history of the office during the period in question.

Rate-Making for Public Utilities, by Lamar Lyndon. McGraw-Hill Book Co., Inc., New York City, New York. $2.00.—This is a hand-book prepared for reading by engineers, municipal authorities, bankers and business men generally. Legal students of rate regulation will view with sympathy, but doubt, the author's attempt "to point out the legal and mathematical conclusions for each and every factor which enters into the consideration of valuation and rate-making," conclusions which to the author appear to be unescapable.

Railroads, Rates — Service — Management, by Homer Bews Vanderblue, Ph. D., Professor of Business Economics, Harvard University, and Kenneth Farwell Burges, LL. B., of the Chicago Bar. The MacMillan Company, New York City. $4.50.—Subjects treated in this volume are the agencies of regulation, practice before commissions, and relations of commissions and courts, the rate-making power, the publication of rates, valuation for rate fixation, principles covering rate structures, the duty to serve, the supply and distribution of facilities, through routing, railway management including railroad credit, labor administration, accounting and railroad consolidation. This book will be found very useful to all lawyers handling questions in its field, and it should be widely used in law schools as supplementary reading for courses on Public Utilities and Carriers.

The Return of the Middle Class, by John Corbin. Charles Scribner's Sons, New York City, New York. $2.50.—This very interesting and stimulating book, by a well-known critic of play, books and events, is as adequately described by its jacket as is possible in the space available for its description: "An original discussion of our social and political predicaments: the author points out that most discussions of current problems are off the mark, for they are conducted on the erroneous assumption that there are two classes, capital and labor, whereas, in fact, there is also the middle class, composed of the brain workers—professional and salaried men. This class has its rights, as apart from capital and labor, which it is in the public interest to protect. The best way to do this would be to increase the influence of the now neglected middle class, which the author calls the brain power of the country as distinguished from the manual and the money power, now markedly underpaid, as a matter of common justice or right and wrong."

II. Current Law Journals

PROF. E. F. ALBERTSWORTH, Western Reserve University in *Cornell Law Quarterly* for April, supplies numerous interesting illustrations of *"Imitative and Apocryphal Reasoning of Courts."* Various causes are suggested; among others, that "many of them are unacquainted with legal science, legal history, philosophy and jurisprudence; lack of time; too much consideration given to precedents; elective judiciary with at times a low grade of personnel." He concludes that "perhaps no particular explanation is all sufficient; the all important matter is that, knowing the causes, these may be eradicated and judicial reform effectuated." In the same journal appear two carefully prepared papers read at The Round Table on Commercial Law, Association of American Law Schools, wherein *"The Advantages and Disadvantages of the Various Methods of Selling Goods on Credit"* are discussed from the economic viewpoint by Prof. Nathan Isaacs, University of Pittsburgh Law School, and from the legal viewpoint by Roswell F. Magill, University of Chicago.

Columbia Law Review for May reprints an article by the late Prof. Charles Thaddeus Terry on *"Law as an Education Study,"* to which is prefaced an appreciation of Prof. Terry by Dean Harlan F. Stone. Under the title *"Frolic and Detour,"* Prof. Young B. Smith, Columbia Law School, critically examines the doctrine of *respondeat superior,* and rejecting the many differing reasons which have been advanced from time to time to explain and support the doctrine, suggests that "whatever may have been the reasons for its origin," the doctrine finds its justification as a rule of present-day law in the reason "which has been offered in justification of workmen's compensation statutes. In substance it is the belief that it is socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry, than to cast the loss upon a few." He also suggests that "if some common understanding can be reached as to what is the supposed object and justification of the rule, there will be greater uniformity in its application, or at least a more intelligent disagreement than has heretofore been the case."

In *"Super-Supreme Law,"* which appears in *Illinois Law Review* for April, Rush C. Butler makes a notable contribution to the current discussions of "the tendency toward the creation of law of this character" which evidences itself in the popular demand for unconstitutional legislation, which, because of human infirmity, the processes of law do not always correct." In view of recent enactments sustained by the courts "which a generation ago would have received little support in the legislative, much less in the judicial, branch of the government," he asserts that "assurances as to the future are lacking and constitutional guaranties are disappearing," and that legislation now pending indicates "the congressional conception of the absence of any barriers whatsoever across the legislative right-of-way of Congress."

Prof. Manley O. Hudson, Harvard Law School, contributes a most instructive discussion of *"The Turntable Cases in the Federal Courts,"* and John Gorham Palfrey has an interesting article on *"The Common Law Courts and the Law of the Sea,"* in the May issue of *Harvard Law Review.*

Lawyers interested in the history of the profession will derive both pleasure and benefit from R. W. Carrington's article in *Virginia Law Review* for May upon *"The Impeachment Trial of Samuel Chase."* The same journal also carries an interesting article upon *"Freedom of Speech and of the Press During the Civil War,"* by Thomas F. Carroll.

In *Yale Law Journal* for May, Prof. Walter Wheeler Cook, Yale Law School, under the title *"Equitable Defenses,"* notes that courts of different jurisdictions have disagreed as to the legal effects of the various statutes providing for equitable defenses in law actions, and undertakes to "try to discover how this great diversity of opinion has come about." He suggests that it is "because of the differing theories which the judges composing the courts had upon . . . the relation of the equity law to the common law." Rejecting the view that the equity law and the common law do not conflict, he argues for "clearness in matters of fundamental legal analysis . . . if we are ever to blend common law and equity into a single harmonious and self-consistent system." In the same journal Charles Wesley Dunn analyzes and discusses the cases upon the general federal law of *"Resale Price Maintenance."*

Gladys Wells, Ann Arbor, Mich., presents *"A Critique of Methods for Alteration of Women's Legal Status"* in *Michigan Law Review* for May. The article fully establishes the proposition that "much caution should be exercised in selecting the most suitable mode of accomplishment, when once the end to be accomplished is determined." An equally enlightening article upon the latter phase of the question by this thoughtful author would be most welcome. In the same journal Prof. Herbert F. Goodrich, University of Michigan, under the title *"Foreign Marriages and the Conflict of Laws,"* discusses most helpfully the many vexing situations growing out of the two questions: "What law governs the creation of the marriage relation; and second, the recognition and protection to be given the relation and incidents arising therefrom, under the law of states other than that in which the relationship was created."

Under the title *"Opinio Prudentum in Anglo-American Law,"* in *Pennsylvania Law Review* for May, Borris M. Komar discusses the weight, as authority, of the oral opinion of the Bar, the lecturers, and of individual lawyers.

Among the excellent articles of the month whose contents are sufficiently indicated by their titles may be mentioned: *"Casual Employment and Employment Outside of Business"* with reference to the Compensation Acts, by Francis H. Bohlen, and *"The Disseisin of Chattels: the Title of a Thief,"* by Max Radin, which appear in *California Law Review* for May; *"The Steps Necessary in an Action for the Recovery of Taxes from the Federal Government,"* by Russell L. Bradford, in *Virginia Law Review* for May; *"Restraining the Collection of Federal Taxes and Penalties of Injunction,"* by Clarence A. Miller, in *University of Pennsylvania Law Review* for May; *"The Duty of Disclosure by a Director Purchasing Stock from his Stockholder,"* by Robert Walker, in the May issue of *Yale Law Journal,* and *"The Position of Shareholders in Business Trusts,"* by Calvert Magruder, in the May number of *Columbia Law Review.*

ROBERT H. FREEMAN.

REVISED PROGRAM FOR MINNEAPOLIS MEETING

Secretary of Council of American Law Institute to Make Statement Friday Morning—Additional Information as to Purchase of Tickets—Where Association and Other Bodies Will Meet—Special Trips Before and After Meeting—Program of Conference of Bar Association Delegates

WE print in this isue the revised program for the forty-sixth annual meeting of the American Bar Association, at Minneapolis. An interesting addition to the program is the statement from the Council of the American Law Institute scheduled for the Friday morning session, to be made by Mr. William Draper Lewis, secretary. The council will hold a meeting at Minneapolis during the meeting of the Association, and now that the great work it has undertaken has actually begun, any announcement of its plans and purposes becomes invested with deep significance for the profession.

On Thursday afternoon the order of the reports of three highly important special committees has been changed. That on American Citizenship will be presented first, by Chairman R. E. L. Saner, that on Law Enforcement will follow, to be presented by Chairman Charles S. Whitman, after which Chief Justice Taft will present the report of the Committee on Judicial Ethics. These special committees have gathered much interesting and important material and their recommendations will be among the most important matters to come before the Association.

Members contemplating attendance will find it to their advantage to read carefully the announcements relating to transportation and places of meeting of the Association and its sections contained in this issue. Their attention is particularly called to the method to be followed in order to secure a reduced rate on the return trip. Reports of reservations even at this date show a widespread interest in the coming meeting—an interest which the program, the weather prospects and the activities of the local entertainment committee are certain to justify to the fullest extent.

Tentative Program

Wednesday morning, August 29, at 10 o'clock.

President John W. Davis of New York will preside.

Address of Welcome by the Governor of Minnesota.

Announcements.

Report of Secretary.

Report of Treasurer.

Report of Executive Committee.

Nomination and election of members.

Address by the President of the Association.

Meeting of State delegations for nomination of General Council and Vice-President and Local Council for each State.

Wednesday afternoon, August 29, at 2:30 o'clock.

This will be a joint session of the American Bar Association and the Minnesota Bar Association.

William A. Lancaster, President of the Minnesota State Bar Association, will preside.

Address by Hon. Pierce Butler, Associate Justice of the U. S. Supreme Court.

Wednesday evening, August 29, at 8:00 o'clock.

Address by The Right Honorable The Earl of Birkenhead.

Election of General Council.

9:45 P. M. President's Reception.

Thursday morning, August 30, at 9:00 o'clock.

Reports of Sections and Committees (Schedule to be later announced).

Thursday afternoon, August 30, at 2:00 o'clock.

Special Committee Reports as follows:

Americanization, R. E. L. Saner, Chairman.

Law Enforcement, Charles S. Whitman, Chairman.

Judicial Ethics, Chief Justice Taft, Chairman.

Thursday evening, August 30, at 8:00 o'cdock.

Address by Hon. Charles Evans Hughes, Secretary of State.

Friday morning, August 31, at 10 o'clock.

Statement from Council of American Law Institute by William Draper Lewis, Secretary.

Reports of Sections and Committees (continued). (Schedule to be later announced.)

Miscellaneous Business.

Election of Officers.

Friday evening, August 31, at 7:00 o'clock.

Annual Dinner of Association.

Dinner to Ladies.

Saturday, September 1.

Excursion (to be later announced).

Meetings of Association and Other Bodies

(a) Headquarters of the Association will be established at the Hotel Radisson. The Secretary's and Treasurer's offices will be located in Assembly Room A on the mezzanine floor.

(b) All sessions of the Association will be held in the Auditorium at the corner of Nicollet Avenue and Eleventh Street, about four squares from the headquarters hotel. The President's reception on Wednesday evening, August 29, will be given at the Leamington Hotel.

(c) The annual dinner of the Association will be held in the Auditorium at St. Paul on Friday evening, August 31st.

(d) The meetings of the General Council of the Association will be held in the Empire Room of the Radisson Hotel.

(e) The Conference of Commissioners on Uniform State Laws will hold its sessions in As-

sembly Room B of the Radisson Hotel, commencing Tuesday, August 21st.

(f) The Conference of Bar Association Delegates will meet in Assembly Room B of the Radisson Hotel on Tuesday, August 28th. There will be three sessions of the Conference on that day.

(g) The Section of Legal Education will meet in the East Ball Room of the Curtiss Hotel.

(h) The Section of Public Utility Law will meet in the Empire Room of the Radisson Hotel.

(i) The Judicial Section will meet in the Empire Room of the Radisson Hotel and the dinner will be held at the Minneapolis Club.

(j) The Comparative Law Bureau will meet in the Empire Room of the Radisson Hotel.

(k) The Section of Patent Law will meet in Court Room No. 2.

(l) The Section of Criminal Law will meet in the Viking Room of the Radisson Hotel.

Later announcement will be made as to the number and dates of meetings of the various sections above mentioned (g) to (l).

Headquarters and Hotels

The Radisson Hotel, Minneapolis, has been selected as headquarters. A list of hotels and prices is printed below. Mr. John Junell, First National Bank Building, Minneapolis, Minnesota, has charge of reservations for members and delegates. In writing to Mr. Junell please state preference of hotel, time of arrival, period for which the rooms are desired, and how many persons will occupy each room. Members may make reservations directly with hotel if they so desire.

Mr. Junell has exhausted all available rooms at the Radisson Hotel, but the other hotels listed below are conveniently located (see plat on page 376) and members will be equally comfortable. These are first-class hotels both as to rooms and service. Members must realize that no one or two hotels can accommodate even a majority of our members, and the anticipated attendance will require the use of accommodations at all of the hotels listed below.

RATES—MINNEAPOLIS HOTELS

(All Rooms with Bath)

Hotel	Single (one person)	Double (two persons)
Radisson	$3.50-$7.00	$6.00-$10.00
Curtiss	2.00- 4.00	3.00- 6.00
Dyckman	2.50- 5.00	4.00- 7.00
West	2.50- 5.00	4.00- 6.50
Andrews	2.50- 3.50	3.50- 5.00
Leamington	3.50- 5.00	5.00- 10.00
Maryland	2.50- 5.00	3.00- 8.00
Buckingham	2.50	3.50
Ogden	2.00- 3.00	3.00- 4.00
Oak Grove	3.00	5.00

NOTE.—Members desiring to stop at Hotels in Saint Paul (about 30 minutes ride by motor bus from the Auditorium at Minneapolis) will find the rates at the Hotel Saint Paul for single room $4-$6 and double room $5-$7, and at the Hotels Ryan, St. Francis, Frederick and Commodore for single room $3-$5 and double room $4-$6; all rates including bath.

Transportation and Special Trips

Loran L. Lewis, Jr., of Buffalo, Geo. B. Harris of Cleveland, John B. Corliss of Detroit, Province M. Pogue of Cincinnati, and Louis J. Behan, Chicago, the Special Committee on Transportation have submitted the following information concerning railroad rates and special trips, which will be of service to our members in making their plans for the Minneapolis meeting. The chairman of the committee—Mr. Loran L. Lewis, Jr., Erie County Savings Bank Building, Buffalo, N. Y.—or other members of the committee will gladly furnish additional information.

1. *Summer rates.* Summer tourist rates to Minneapolis and return will be in effect from June 1 to Sept. 30, 1923, available only for members residing in the Pacific Coast and in states west of Rocky Mountains. Members from these states are requested to inquire at the nearest ticket office for schedule of rates, which will be based on a single fare and a small fraction thereof for the return trip.

2. *Special convention rates.* For the benefit of members residing in the eastern and southern and all mid-western states, including Montana, Wyoming, Colorado and all states east of Rocky Mountains, arrangements have been made with the railroads whereby members of the American Bar Association and dependent members of their families who attend the annual meeting will have the benefit of a *fare and one-half.* They will pay *full fare going to Minneapolis,* and, upon purchasing railroad ticket, will ask for a certificate which must be viséd at Minneapolis by the Secretary of this Association, thus entitling the holder to *one-half fare on the return trip.* This plan is conditional upon a minimum of 250 return trip tickets and the return trip must be made via the same route as going and within the time specified on the ticket.

The following directions are submitted:

1. Tickets at regular one-way tariff fare for the going journey can be bought on certain dates, which will be announced in the *July Journal,* for the various passenger territories. These dates will be approximately three days prior to the meeting of the Commissioners on Uniform State Laws, and the meeting of the American Bar Association, with due allowance for time of travel to Minneapolis in both cases.

2. When purchasing your going ticket, ask for a CERTIFICATE. Do not make the mistake of asking for a *receipt.* See that your certificate is stamped with the same date as your ticket. Sign your name to the certificate in ink.

3. Certificates are not kept at all stations. Ask your home station whether you can procure certificates and through tickets to the place of meeting. If not, buy a local ticket to nearest point where a certificate and through ticket to place of meeting can be bought.

4. Immediately on your arrival at the meeting, present your certificate to the endorsing officer, Secretary W. Thomas Kemp, as the reduced fare for the return journey will not apply unless you are properly identified as provided for by the certificate, and your certificate is validated by the Joint Agent who will be at the Secretary's office during the meeting.

5. If the necessary minimum of 250 regularly issued certificates are presented to the Joint Agent, and your certificate is validated, you will be entitled to a return ticket via the same *route* as the *going journey* at one-half of the normal one-way tariff fare from place of meeting to point at which your certificate was issued up to and including September 5th, 1923.

6. Return tickets issued at the reduced fare will not be good on any limited train on which such reduced fare transportation is not honored.

3. *Special trip via Great Lakes.* A special trip going to Minneapolis via the Great Lakes has been arranged and will be in charge of our Transportation Committee. All members who can avail themselves of this route are urged to do so, as the party will be to-

gether on the steamer throughout a delightful trip of four days' duration with several stops at interesting points en route. This special trip will be made on the steamer Juniata of the Great Lakes Transportation Company, leaving Buffalo on Thursday, August 23, at 9:00 A. M., arriving the same day in Cleveland at 10:00 P. M., and leaving Cleveland one hour later; arriving in Detroit, Friday, August 24, at 7:00 A. M., and leaving two hours later; arriving at Mackinac Island, Saturday, August 25, at 9:00 A. M., remaining two hours; arriving at Sault Ste. Marie the same day at 6:00 P. M., and leaving one hour later; arriving at Houghton, Mich., Sunday, August 26, at noon and remaining five hours; arriving at Duluth Monday, August 27, at 7:30 A. M.

Mr. H. G. Gearhart, First National Bank Building, Duluth, Minn., a member of the Entertainment Committee of the Minnesota Bar Association, is arranging an automobile trip around Duluth and suburbs during the forenoon. After luncheon members will board a special train from Duluth to Minneapolis and will arrive in Minneapolis about 6:30 P. M., August 27th.

This lake trip is available for members from the eastern, southern and some other states. Members may join steamer at Buffalo, Cleveland or Detroit. The combined rail and steamer fares one way including meals on steamer and one berth in inside room are as follows:

Boston to Minneapolis	$74.92
New York to Minneapolis	72.82
Philadelphia to Minneapolis	71.98
Baltimore to Minneapolis	71.27
Buffalo to Minneapolis	57.00
Cleveland to Minneapolis	52.50
Detroit to Minneapolis	47.00

Supplemental charges for better room accommodations are from $5.00 to $12.00 per person. Pullman fares to be added.

The return trip may be made by rail or by lake steamer regular schedule.

4. *Other trips before or after meeting.* The Committee has collected much data upon various interesting tours which may readily be combined with the trip to Minneapolis. Space permits a mere reference to these tours, but further detailed information can be obtained from the Committee or from the nearest ticket office. The usual summer rates for these tours will be in effect from eastern, southern and mid-western states via Minneapolis with full stop-over privileges, to the Rocky Mountains or Pacific Coast. No matter what tour is taken, the railroad rate will be a one way charge plus approximately $20 if Portland, Seattle, Tacoma or Canadian Rockies are included, but if San Francisco and Los Angeles or other points to the south are also included, the rate will be a one way charge plus approximately $38. These tours may be made via the Lake route special trip to Minneapolis and thence via the routes selected to any points desired. A few of these tours suggested by the Committee are as follows:

(a) Canadian Rockies, including Banff, Lake Louise, Glacier, Sycamoos and Vancouver, returning via Seattle, Portland, or extending the trip to San Francisco and Los Angeles, and thence returning by any route desired.

(b) Yellowstone Park, thence continuing to Portland and Seattle, and returning direct or via California routes or the Canadian Rockies.

(c) Yellowstone Park, returning via Salt Lake City, Denver and Colorado Springs.

(d) Yellowstone Park, returning via Denver and Colorado Springs.

(e) Glacier National Park, returning via Yellowstone Park, or other routes.

(f) Mount Rainer National Park via electrified scenic route, returning by any route desired.

(g) Great Lakes, Georgian Bay, Niagara Falls, Thousand Islands and St. Lawrence River, returning by any route desired.

Reservations for the special lake trip are in charge of Mr. Loran L. Lewis, Jr., Erie County Savings Bank Building, Buffalo, N. Y. Members are requested to communicate with Mr. Lewis at their earliest convenience, stating room accommodations desired and place at which steamer will be boarded—Buffalo, Cleveland or Detroit.

Members desiring to take tours before or after the meeting must make their own reservations, but they may obtain detailed information by writing to Mr. Louis J. Behan, Otis Building, Chicago, Illinois, or consulting the nearest ticket office.

Conference of Bar Association Delegates

Members of the American Bar Association who expect to attend the Minneapolis meeting should make it a point to ascertain whether their local city or county bar association is to be represented by delegates to the meeting of the Conference of Bar Association Delegates, to be held Tuesday, August 28.

Very often the presidents of local associations appoint as delegates members who do not attend, or fail to appoint because they do not know of any member who will attend. In either case the association loses its representation.

This difficulty may be solved in many cases if those now planning to go to Minneapolis will find out if their local association needs delegates or alternates. (It is entitled to two each.) In many instances it will enable the local president to make an appointment to the mutual benefit of his association and of the Conference.

Program

The Conference will meet in Minneapolis on Tuesday, August 28, 1923. There will be three sessions on that date, at 10 a. m., 2 p. m. and 8:30 p. m.

Forenoon Session, 10:00 A. M.

Opening Address: Chairman Charles A. Boston.

Reports of Committees: Judicial Selection: William D. Guthrie, Chairman. Bar Organization: Clarence N. Goodwin, Chairman. Moral Character of Candidates for the Bar: George W. Wickersham, Chairman. Co-ordination of the Bar: Clarence N. Goodwin, Chairman.

Reports by Delegates on Bar Association Accomplishments.*

Afternoon Session, 2:00 P. M.

Reports by Delegates (continued).*

Special Topic: Conciliation and the Administration of Justice.

The Place of Conciliation in the Administration of Justice: Reginald Heber Smith, of Massachusetts.

Conciliation in the Judicial Systems of Scandinavia: George Ostenfeld, Esq. of Copenhagen, and Axel Teisen, Esq., of Philadelphia.

Conciliation in the Judicial System of North Dakota: Attorney General George F. Shafer of Bismarck.

Conciliation in Small Causes: Minneapolis, Judge Thomas H. Salmon; Cleveland, Chief Justice Dempsey, Cleveland Municipal Court; New York, Justice Edgar J. Lauer, Municipal Court of New York.

Evening Session, 8:00 P. M.

Conciliation (discussion).

Observance of Constitution Week: R. E. L. Saner, Chairman of Committee of American Bar Association on American Citizenship.

The Progress of Bar Integration, Election of Officers, Miscellaneous new business.

*Delegates desiring to report should send their names and the subject of their report to the Secretary in advance of the meeting, so that the necessary allowance of time can be made.

An American Bar Special Train from Dixie to Pacific Coast, Western Canada, Jasper Park and a Two Days' Boat Trip.

A large delegation from the South Atlantic States to the Minneapolis meeting of the American Bar Association is assured. Lawyers from the Carolinas, Georgia, Tennessee, Alabama and Florida are organizing a special train which is planned to leave Spartanburg, S. C., August 3rd, routed via Atlanta, Chattanooga and Nashville on August 4th.

This party will spend one day at Colorado Springs; one day at Salt Lake; four and a half days in Yellowstone Park; two days each at Los Angeles and San Francisco; one day at Portland and on the Columbia River Highway Drive; thence to Vancouver, and from there taking two days' boat trip to Prince Rupert; thence via Jasper Park and Winnipeg to Minneapolis, arriving on the morning of August 29th in time for the opening meeting of the Bar Association Meeting. Returning the party will spend two days in Chicago, getting back to Spartanburg, September 4th.

Having a special train will add much to the enjoyment of the trip, the plan being to have all-steel Pullman cars, with diners, club, baggage and observation cars. The trip will be so arranged as to pass the Royal Gorge, Tennessee Pass, Mt. Shasta and other interesting scenes in daylight; and when necessary cars will be side-tracked at night in order to view scenic route. When convenient the cars when side-tracked will be used as sleeping apartments, but at Los Angeles, San Francisco and Minneapolis hotel reservations will be made for the stop overs. This will not be an ordinary tourist party, but all accommodations will be first class.

All details as to transportation, sight-seeing trip to Pike's Peak; Cave of the Winds; Garden of the Gods at Colorado Springs; Yellowstone Park; Catalina Island, Hollywood, etc., at Los Angeles; Mt. Tamalpais, Muir Wood and a day for individual sight-seeing at San Francisco; Columbia River Highway Drive to Portland; two days' boat trip from Vancouver to Prince Rupert and a day in Jasper Park are being provided for.

Circular letters are being sent out to all the members of the Association in the Southeastern States, and if enough reservations are made a special train will be chartered for the round trip.

Cornelius Otts, Esq., is Chairman of the Committee on the South Atlantic States Special Train, and is arranging all details as to routes, schedules, etc., for the trip, and full particulars may be had as to the proposed special train by addressing Cornelius Otts, Esq., Allen & Law Building, Spartansburg, S. C.

NOTE: The map on the left hand shows the location of Minneapolis' hotels and gives a good idea of the general plan and direction of the streets. Access to meeting place from all hotels is easy and rapid.

THE "NEW FEDERALIST" SERIES

Judge Andrew A. Bruce, of the American Bar Association's Committee on American Citizenship, Writes of "Our Inheritance of Law" and Gives the Layman a Definite Idea of Its Greatness and Significance

In the task of helping to explain and sustain American institutions by promoting a clear understanding of the reasons for them, the American Bar has an important part to play. Conscious of the need and the responsibility, the AMERICAN BAR ASSOCIATION JOURNAL has undertaken the program of printing a series of brief articles, beginning with the March issue, on American principles of government, under the title of "The New Federalist." There is not a particle of political significance in the title chosen. The historical political significance definitely attached to the name "Federalist" came after the publication of that remarkable series of Federalist Papers, in which Hamilton and Madison and Jay engaged in the task of enlisting the support and reaching the mind and heart of people in behalf of the Constitution under which we have lived and prospered so long.

These articles will not be addressed to the legal profession, which will find the justification of such contributions in the character of the work done and the importance of the proposed public service, but to those who need the information. They will be clearly written, reasoned and not declamatory, adapted to the fair intelligence of both native and foreign-born citizens, and will make a special effort to counteract current misconceptions on fundamental points.—(From announcement of the New Federalist series in the JOURNAL, February, 1923.)

LAW is merely applied political economy, applied sociology and applied social ethics. It is the applied science of Government. To a large extent it is applied civilization. It can never rise higher than its source; in it must always not only be the excellencies but the frailty and the ignorance of the human being and of the human mind.

The problem of government is not a new one. We are the inheritors of the ages. In our American institutions, our constitutions and our laws are the work, the suffering and the experience of centuries. Back of all of the liberty that we now enjoy, back of the hope and of the opportunity of America are not merely Bunkers Hill and Lexington but the age long struggles and experiences of the liberty-loving peoples from whom we have derived our cosmopolitan population. Back of our American democracy and back of our government of laws and not of men, which alone makes that democracy possible, are the struggles and ideals and traditions of millions of men. Back of them are the thought of the world's great thinkers and law makers. Back of them are the prophet and the martyr. Back of them are the scaffold and the gibbet. Back of them are the battle fields of the centuries.

Today we hear of socialism and of communism and of scientific anarchism. These theories of government or of lack of government however, are not new nor were the founders of our nation unacquainted with them. We and our fathers had sense enough however to choose none of these. Socialism and communism, which in spite of the hair-splitting of the theorists are much the same, imply an almost complete destruction of individual self-respect and of individual initiative. Socialism involves the common ownership of all of the agencies of production; communism the common ownership of all of the fruits of production. Both involve an extreme of government. Under socialism, and to almost an equal extent under communism, all human activity would be regulated and dictated and controlled by law. Socialism is all law as opposed to scientific anarchism which is no law.

We have repudiated communism because our fathers had an experience in these things, because they had read the history of the past and had nowhere seen a virile and lasting state or civilization in which communism had prevailed; because they were fresh from the experiences of the Plymouth Plantation, concerning which and after depicting the misery and privation which came from the communistic experiment in which, Governor Bradford wrote:

"So they bagane to thinke how they might raise as much corne as they could, and obtaine a better crope than they had done; that they might not still languish in miserye. At length, after much debate of things, the Govr (with ye advise of ye cheefest amongst them) gave way that they should set corne every man for his owne particuler, and in that regard trust to themselves; in all other things to goe on in ye generall way as before. And so assigned to every family a parcell of land, according to the proportion of their number for that end, only for present use (but made no devission for inheritance) and ranged all boys and youth under some familie. This had a very good success: for it made all hands very industrious, so as much more corne was planted than other waise would have bene by any means ye Govr or any other could use, and saved him a great deal of trouble and gave him far better contente. The women now went willingly into ye feild, and took their little ones with them to set corne, which before could only aledg weakness and inabilitie, whom to have compelled would have been thought tiranie and oppression."

Back of us indeed were the experiments and the theories of many ages. With our eyes open we chose neither communism nor socialism nor anarchism, neither all law nor no law, neither liberty unrestrained nor an absolute collectivism, but a sane compromise between these things. We premised individualism and the right to private property, but we incorporated the maxims "the public welfare is the highest law" and "so use thine own that thou injure not that of another."

Much confusion exists in the popular mind in regard to the difference between courts of law and courts of equity and the question has been asked if there is no equity in the law courts. Whatever may have

originally been the fact, the difference today both in England and in America is one of remedy and procedure rather than of substance or of basic right, and in the so-called code states of America, where practically speaking the two systems have been combined, the distinction has almost entirely disappeared. The difference is that in the courts of law you can as a rule only recover damages for the wrong done and recover the possession of specific property while in the courts of equity you can prevent the wrong being done; you can have contracts cancelled and reformed; you can remove clouds from title.

All these things could well have been done by the so-called common law judges, and on the continent of Europe and where the so-called civil law prevails, no distinction between law and equity is recognized. The separation of the courts in America, where they are separated, is due entirely to the fact that we derived our legal system from England. There it was due to the struggle between the native population and the Norman invader and the fact that for several centuries the chancellors were ecclesiastics and were generally of foreign origin.

The Anglo-Saxon law was the law of a primitive people. It was a law of damages rather than of prevention, it was perhaps too subservient to precedent and enforced perhaps irrational customs. But it was the old law of the land. The Roman and civil law which the invading lawyers and the ecclesiastics sought to impose was scientific and in many respects much more ethical and progressive than that of the natives, but it was not English-made; it bore the brand "Made in France" or "Made in Italy." The result was the growth of the two rival courts. At first, where the native law was inadequate, where in fact there was no adequate remedy at law, the aggrieved party would go to the king, who claimed to be the repositary of all justice, and, as a matter of grace, ask for the relief which the common law courts refused. Soon the king became too busy to attend to these matters and turned them over to his chancellor, and it was thus that the courts of equity or of chancery began.

It would have been the easiest thing in the world for the English common law judges to have expanded their system and to have adopted the equitable principles of the courts of chancery and of the Roman law, but they were too stubborn to do so. If they had not been so stubborn they would have put the courts of equity as separate tribunals out of existence. As it is we have inherited the two systems in America though we are rapidly merging them.

A larger portion of our law is judge and not legislature-made. The courts are in continuous session. The legislatures meet only at intervals and usually for but short periods of time. Parliamentary government is of a comparatively modern creation and for many centuries the English parliaments were not called for the purpose of basic legislation but in order that taxes might be voted and the king's coffers be filled. Even today our legislative assemblies are occupied in determining political matters, in caring for our public institutions, in providing for methods of taxation, in voting supplies and in the regulation of employment and of industry rather than in the creation of a basic law or the formulation of personal and property rights.

The members of our legislatures are usually elected for but brief periods of time. Often they come to the legislative halls totally unprepared and with no knowledge of the great body of law which is now in existence. The sober paths of constructive legislation which require study and experience, and which are not noticed by the newspapers have no allurements for them. Usually the legislator is a local rather than a public representative. His re-election is dependent, not on his record as a constructive lawmaker, but on whether he has secured local appropriations and forwarded local class needs and desires.

The result is that either there must be no progress and no legal growth or the courts must determine the rules of conduct and liability which shall generally prevail in social and in business affairs, and by the process of determining individual cases, formulate the general and universal law. They decide some new question in a controversy between Smith and Jones and when the same question arises between Brown and Perkins they follow the former decision and thus the stable law grows. In an evolving society where each new invention creates new problems and new causes of complaint they must of necessity be real lawmakers. This has always been and always will be the case. Practically all of the law of master and servant, of negligence and contributory negligence, of common carriers, and practically all of our business and commercial law was originally of judicial and not legislative origin.

Each new invention, each new departure in industry involves new rights and obligations and new law. The old law must ever be adapted to the new situation, and the legislatures never have and never will keep pace with the need. Accidents occurred, gears became corroded by defective oils and the rights and obligations in relation thereto had to be settled and determined long before automobiles were considered of sufficient importance for legislative regulation. The stage coach had been supplanted by the passenger train, and tens of thousands of accidents had occurred long before the legislatures awoke to the realization of the fact that the new device was intrinsically dangerous and that the rights of the travelling public need to be protected. Controversies are daily arising in every industry and in every field of human endeavor for which there is no legislative solution, and the judges are daily being called upon either to adapt the old law to the new needs or themselves to formulate new rules of conduct and of liability which shall safeguard the rights of the parties, make a settlement in the courts possible, and avoid the primitive resort to the bludgeon and to the shotgun.

We have followed precedent, but the following of precedent has been our greatest safeguard against judicial tyranny. We have sought to make our judges realize that all-powerful as they may be, they themselves are the servants of the established law, and that the discretion that they exercise must be a judicial discretion. We have trained them to believe that though in cases of great exigency, and in order that society may progress and that wrong may be avoided, they may reach forward and pave the way, we have left it to our legislatures and our constitutional conventions to make the radical changes and to lead in the great democratic advance. We have done this to avoid judicial tyranny, the recurrence of Judges Jeffries, and Star Chambers. We have done this for the sake of security and certainty. We have done this so that there may not be one law for the weak and another for the strong, one law for Smith and another for Jones.

We have done this so that a lawyer may know how to advise his clients and that there may be some security in personal and property rights.

Throughout and where there have been no controlling precedents of our own we have borrowed from the wisdom of the ages, and this is the reason for our libraries and for the studies of our legal scholars. We have borrowed from the Roman law, but back of the Roman law is the law of the Greeks, the Phoenicians, the Egyptians and the Assyrians. Some say that we derived our law of trusts from the Germanic tribes and some from the Romans, some think that we got our theories of equity from the Romans, some think that our jury came from the Norsemen and some from the Romans, but how and from what sources did these people get these ideas? Can it be believed it was the Roman who first thought of preventing wrong? Was not Adam himself enjoined from tasting the forbidden fruit, and is it not possible that a primitive cave man may have enjoined his son from molesting his neighbors or the members of his household from organizing a strike. Much of the law and many of the ideas of our early colonies were derived from the Old Testament, and much of the social thought of today was derived from the new, yet the new is but an extension and in many respects a re-expression of the old, and much of the law of the Hebrews was borrowed from the Assyrians, the Egyptians and the Phoenicians and from the laws and customs of the numerous people with whom they lived and traded. Abraham himself came from Ur of the Chaldees. In the code of Hamurabbi, which was written two thousands years before the Christian era, we find a provision for the seventh day of rest. Wills were made and the practice of devising property existed among the Assyrians, the Egyptians and the early Hebrews. The trouble with only too many of our modern reformers and enthusiasts is that they think that civilization was born yesterday morning at two o'clock. To them everything is new and they think that they themselves are great discoverers. They have no knowledge of the history of the past. They are ignorant of the fact that most of their so-called new ideas and discoveries were known and experimented with centuries ago.

The writer of this article is not a reactionary. He believes in progress. He believes however in a thoughtful democracy and not in a thoughtless democracy. He believes in a progress and an evolution under the law and in accordance with the law. He believes in taking counsel of the past. He believes in changes where necessary and when well thought out, but he does not believe in overthrowing the whole structure of American democracy and government because of a few defects, nor in abolishing in a single day a legal and social edifice which it has taken centuries of suffering and of martyrdom to create and which is built on the experience of the ages.

In this day of world anarchy and misery and chaos and class hatred, we should recognize the splendor of America. We should think of the hope and the freedom and of the opportunity that is ours. We should think of the comradeship that is ours. We should ask ourselves if much of this progress and much of this comradeship has not been due to the fact that we of all the peoples of the earth have been able to grasp the magnificent concept of the government of a free people, made free by law and by law alone.

WHY CHOOSE THE LAW?

Appeal of the Legal Profession to One Who Desires a Career Which Touches Life at Many Points and Invites and Promotes Full Personal Development

By ARTHUR A. BALLANTINE
Of the New York City Bar

AS the time recurs when college students select their vocations, something way well be said as to the present appeal of the law. This calling is not so distinctive as when it shared the status of profession with the ministry and medicine only, and its value is less readily admitted than when the law furnished most experience in large affairs and unquestionably the best approach to public office. None the less the legal profession still offers opportunity for the full development of intellect, character and personal capacity, together with useful social service.

The names of lawyers who have stood out in the history of the country—Hamilton, Marshall, Webster, Lincoln and Cleveland—are themselves a call to the bar. The inquiring student wonders, however, whether such men would today be attracted to the practice of the law in preference to the pursuit of newer professions like engineering and scientific business. There is therefore need of calling attention to the nature of legal work and the qualities developed by pursuing it.

The field of the law is the adjustment of human relations through the power of the state. Its subject matter is thus the whole of contemporary economic and social life. In England, where most men lived on great landed estates in one relation or another, the law dealt with each detail of those relations. In the highly developed industrial civilization of today the law is concerned with the relation of one individual to another; in the family—marriage, divorce, succession; in work—contracts, employment, competition, unfair trade; with every form of association—corporations, voluntary associations, partnerships; with the relation of groups—labor unions, strikes, industrial relations. As men take to the air the law must follow and fix their paths. Inventions which condition our living have their history recorded in patent litigation. There are new phases of the old problem of the relation of the individual to the state—labor laws, minimum wage laws, tax laws, zoning laws, Volstead acts. The law thus makes fullest demand upon capacity to understand what is vital in the activities of the day.

Any leaning toward book learning is also satisfied. A vast literature must be kept at command. In the myriad reports and treatises lies the record of much of

what earlier generations thought about the just ordering of human relations. There, to be separated from the rubbish, are principles which robust thinkers won from their experience and established by their power of reason and instinct for justice. Study of the law brings kinship with the significant past and skill in dealing with literary material. Today the task is not so much antiquarian unravelling of the past as the more fruitful labor of adapting abiding results of earlier thought to the needs of the present.

Operating the legal machinery develops expression and resourcefulness. The actual trial of cases is today no part of the work of many lawyers, but they usually gain at some stage some experience in court work and in the art of the oral development and presentation of a cause. In court or hearing the story is unfolded with unexpected turns, and the issue may be decided upon the spot. Forethought, adaptability and resource are all required and developed. Presenting of oral or written argument to a deciding tribunal is not surpassed as training in expression.

As advisor the lawyer is called upon for broad and intelligent understanding of business and personal problems of every nature. There is no reach of knowledge or wisdom beyond possible call; no limit to the field for sympathetic insistence upon abiding standards of conduct. The lawyer speaks to his client and to his opponent not by word only but by the whole weight of his personality.

It may be said of the law that because it deals with the multifarious phases of contemporary life it demands the scientist's power of observation and classification; because it deals so largely with human personalities it demands understanding which comes from the heart; because it deals with principles and lierature it demands the student's grasp and command; because it deals with practical ends it demands common sense; because it calls for convincing embodiment of results it demands the power of oral and written expression; because the client must entrust to the lawyer his most vital interests, because the lawyer's word must be implicitly trusted, it demands character. On all sides it invites and promotes full personal development.

There is, furthermore, a satisfaction in following an old pursuit enriched by memory and tradition. There is lively pleasure in sharing and continuing these traditions with others of like mind, and stimulus in the constant measuring of efficiency with others of like pursuit.

The question of whether the lawyer renders a social service may be uppermost in the minds of the choosing student of these days. Jack Cade's first projected reform was to abolish lawyers; Sir Thomas Moore placed no lawyers in Utopia. The same thought finds expression in the free verse of the day;

> The work of a bricklayer goes to the blue.
> The knack of a mason outlasts a moon.
> The hands of a plasterer hold a room together.
> The land of a farmer wishes him back again.
> Singer of songs and dreamer of plays
> Build a house no wind blows over.
> The lawyer—tell me why
> A hearse horse snickers hauling a lawyer's bones?

The ancient charge of parasitism here repeated rests upon the idea that the lawyer produces no commodities. Absence of any material output is of course as true of the doctor, the educator, the scientist and of the versifier. Like them the lawyer deals with ideas, not with lime, lath or lands. If material output is to be regarded as the shibboleth it is to be considered that all economic activity is conditioned upon the acceptance and working out of ideas. Uncertainties and conflicts as to economic output prevent output. The lawyer's contribution to the output of commodities is the securing of relations and conditions which make output possible. The lawyer too "builds a house no winds blow over"—builds, repairs and improves the structure of ideas which sustains the necessary framework of the whole economic process. In discussing the essential claims of the individual—to the control of corporeal things, to freedom of industry and the like—Dean Pound has said:

> Legal recognition of these individual claims, legal limitation and securing of individual interests of substance is at the foundation of our economi: organization of society.

Most of the lawyer's work of today does not arise from disputes and quarrels. It consists in so setting forth undertakings and reconciling them with social requirements and providing for contingencies that no disputes arise.

There are, indeed, lawyers who do not reconcile conflicts but promote and feed upon them. Today perhaps, as never before, it is recognized that such lawyers are simply bad lawyers. With the fuller development of the social conscience most business men have come to see that they do not benefit by pressing for undue advantage. To do business securely and permanently men must do business justly. The abler lawyer, far from aiding his client to petty advantage, helps him to effect the larger social interest.

In Russia law has apparently been eliminated, and with it most of individual freedom. Only through the establishment of a new slavery would there be eliminated the need for law and those skilled in its practice. As long as individuals are left free within reasonable limits to pursue their own needs, as long as industrial civilization is maintained, law and lawyers must continue. In the contest for individual liberty lawyers lead and for its maintenance against new enemies they are essential. Because of the complexity of economic conditions the task of working out limitations which are essential to reconcile liberty with the social interest is exceedingly difficult. Lawyers have an indispensable part in sifting and analyzing proposals aimed to secure a larger measure of social justice and giving concrete application to what is practicable in them. As in the past, law-givers will be drawn very largely from among the lawyers.

What may be hoped for in the era of reconstruction is not less law but better law. Further limits must be set to the pursuit of selfish ends, but those limits must be set through law. The hope of the world for international order sounds the greatest of all calls to constructive legal thinking. Extension of world jurisdiction must be met by extension of the lawyer's thought. The world of today does not need fewer lawyers, it needs more lawyers alive to the current demands and possibilities of the ancient profession.

To Address Wisconsin State Bar Association

Mr. William P. MacCracken, Jr., of the Chicago Bar, has accepted an invitation to address the Wisconsin State Bar Association on June 28, as the representative of the American Bar Association. Mr. MacCracken is chairman of the Association's committee on aviation, and has been active in connection with the recent membership campaign.

TRADE REGULATION

A Department Devoted to a Review of Recent Federal Trade Commission Rulings and of Court Decisions Relating to Unfair Competitive Practices

By HERMAN OLIPHANT

Combinations in Restraint of Trade

UNITED States v. *National Association of Window Glass Manufacturers*, District Court N. D. Ohio E. D., February 22nd, 1923, 287 Fed. 228, is a case on combinations and monopolies with facts of unusual interest, because seldom met with. This was a suit brought under the Sherman Anti-Trust Act, and involved the legality of contracts between an organization of substantially all the manufacturers of hand-blown window-glass and an organization of all the skilled workers in that industry. The contracts provided for a wage agreement. In effect, though not in form, it provided that all the manufacturers of hand-blown window-glass should be divided into two classes, one class operating during the first half of each year, the other during the second half of the year. Westenhaver, District Judge, held this to be an agreement, the effect of which was to limit production, enhance prices, and that consequently it was in violation of the Sherman Anti-Trust Act. It was urged in defense of this arrangement that the hand-blown glass industry is a dying one, due to the inroads of machine-blown glass, that there were enough factories manufacturing hand-blown glass to employ 2,000 skilled workmen, but that there were only 1,000 such workmen, due to the fact that new men were not entering the craft because it was a dying one. It was contended that without this arrangement all of the factories would be undermanned with a constant shifting of workmen from one factory to another. This would involve loss of time and the paying of excessive wages. The arrangement, it was contended, was designed to see that every factory while in operation was fully manned, thereby reducing the cost of manufacturing, enabling hand-blown glass to compete with machine blown glass.

At first blush this arrangement looks like a rational plan to enable this industry gradually to disappear, without too great a hardship being imposed upon the skilled workmen engaged therein, due to their inability so late in life to shift to other skilled occupations. The court, however, saw and pointed out that, without such an agreement, the most efficient factories would survive, those whose costs were high disappearing in the struggle. If the only consideration is a saving of cost to the purchasing public, the court's answer seems conclusive. It may involve, however, the grave hardship of causing workmen advanced in years, owning property, and well integrated in the social life of a given community, to have to uproot themselves and family and move to the places where the low cost factories are located. In the light of the cases, this is no objection for, under the present the competitive régime in the labor market, labor is treated as if perfectly fluid, although from the standpoint of social welfare, so treating it must often have grave consequences.

The Journal of Commerce Publishing Company v. *Tribune Co.*, Circuit Court of Appeals, 7th Circuit, October 3rd, 1922, 286 Fed. 111, was an action by the Journal of Commerce of Chicago against the Chicago Tribune, wherein an injunction and damages were sought. It appeared that the newspaper carriers of Chicago owned their own routes and that they purchased outright each day the number of newspapers which they needed. The Tribune Company had no contracts with these carriers, wherein the carriers agreed not to handle other competing newspapers and no contracts wherein the Tribune Company had agreed to sell its newspapers to the carriers. The Tribune Company notified each carrier that, if he handled the Journal of Commerce, it would no longer sell him its papers.

In an opinion delivered by Circuit Judge Baker, it was held that this was not a violation of the Sherman Anti-Trust Act, the Federal Trade Commission Act, or the Clayton Act. Section 3 of the Clayton Act was not violated because that section prohibits a sale or contract to sell on condition or understanding that the purchaser shall not deal with a competitor. Here there was a mere refusal to sell except on that condition. Section 5 of the Federal Trade Commission Act, prohibiting unfair methods of competition, was probably not violated in view of the holding of the United States Supreme Court, in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, that it was not an unfair method of competition for a trader to refuse to sell one of his commodities unless the purchaser bought a certain quantity of another also. This practice, known as "full line forcing," is at least as objectionable as forcing exclusive dealing, which was the competitive practice used by the Tribune Company.

There is no justification for considering the action of the Tribune Company a violation of the Sherman Anti-Trust Act under the decisions of the Supreme Court interpreting that Act. It is to be noted that the defendant did not threaten the unlawful act of breaking any contracts. Plaintiff contended that the Tribune Company was engaged in a business impressed with public interest. Of this contention the Court said that it needed "no attention, we think, except to show that it was not passed unnoticed."

In *United States* v. *Hency*, District Court N. D. Texas, February 10th, 1923, 286 Fed. 165, Alwell, District Judge, held that an agreement to disable railroad engines belonging to, and used by, a railroad company engaged in interstate commerce, which were not at the time of injury attached to a train, was not a conspiracy in restraint of trade within the Sherman Anti-Trust Act because the act of injuring such an engine bore too remote a relation to interstate commerce, and secondly, because such a wrong was totally outside of the category of wrongs intended by Congress to be covered by the Sherman Anti-Trust Act.

It is interesting to compare the case just mentioned with *United Leather Workers' Union* v. *Herkert & Meisel Trunk Company*, Circuit Court of Appeals, 8th Circuit, October, 1922, 284 Fed. 446. This was a suit in equity by the Trunk Company against the association of six hundred union workmen of St. Louis, Missouri,

to enjoin them from compelling or inducing employees of the plaintiff, by unlawful means, to leave the service of the plaintiffs. In an opinion by Sanborn, Circuit Judge, concurred in by Munger, District Judge, it was held that the injunction requested had been properly granted. Stone, Circuit Judge, dissented on the ground that interstate commerce was not affected. The plaintiffs were trunk manufacturers. A part of their products was shipped in interstate commerce. The strike, accompanied by unlawful means, was called in order to unionize the plaintiff's plants. No attempt was made to prevent the plaintiff from shipping its products or receiving raw material in interstate commerce. The conspiracy was confined to preventing manufacturing. The position taken by the majority of the court was that the manufacture of an article constructed or intended for, or normally going into interstate commerce constitutes a part of such commerce. A conspiracy to prevent manufacturing would of necessity prevent interstate shipments and, therefore, an intent to prevent the latter should be conclusively presumed. This position is ably defended by the opinion of the majority of the court. Some sentences in the dissenting opinion are as follows: "This conclusion (of the majority of opinion) is based upon the argument that if the manufacture is prevented, the article cannot enter interstate commerce, and therefore manufacture is an 'intermediate step' in and an integral part of such commerce. This is patently true as a result of logical reasoning, but is it true when the problem before the court is to define that somewhat difficult line which separates the powers of the nation over interstate commerce from the powers of the states over intrastate commerce and internal police regulation? Such a problem must be solved along 'practical' as well as logical lines."

"The consequences of a legal rule are often useful in testing its accuracy. There can be no shadow of doubt as to the consequences of the rule laid down in the majority opinion. The natural, logical and inevitable result will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to federal jurisdiction provided any appreciable amount of its product enters into interstate commerce. Moreover, if this be true as to the products produced in such industry or factory, it is entirely logical that the same rule should apply to the raw materials used in such production if any of them are subjects of interstate commerce. In a practical sense, this would result in all strikes being subject to federal jurisdiction, because scarcely any factory is so small that some of its finished products do not enter into interstate commerce. And yet the Supreme Court has, within the six months, held that a strike in a mine shipping seventy-five percentum of its coal in interstate commerce and involving many miners and much property was without the federal jurisdiction (*United Mine Workers of America* v. *Coronado Coal Company*, 42 Sup. Ct. 570), and that the court has never departed from, but has repeatedly and recently affirmed, the doctrine, announced almost 40 years ago, that manufacturing of interstate products is not interstate commerce."

Unfair Advertising

Within the last month nine orders to desist by the Federal Trade Commission have been received. It is noteworthy that all of these cases involve but a single unlawful competitive practice, i. e., unfair advertising, either in the form of fictitious pricing or misleading branding.

CURRENT LEGISLATION

UNIFORMITY OF REGULATORY LAWS THROUGH FEDERAL MODELS

By J. P. CHAMBERLAIN

FEW American business men or farmers produce articles for consumption in the state in which they are produced. Even if the original sales are made at the factory door or at an elevator on a near-by railway siding, a large proportion of the goods will be subject to the laws of one more state before they are at rest in the fields, on the dinner tables or on the backs of the ultimate consumer. If the state of production and the state of consumption fix conflicting standards of quality or quantity in respect to the same article, the producer might be forced to break the law of his own state to comply with that of his customer, and even were this not so, he must carefully label or prepare or grade differently the goods for consumption in each different state.

In addition to varied state legislation, Congress, through its power over interstate commerce, is a possible source of more confusion, but in practice a custom has grown up for the states to accept the standards and grades established by Congress so that uniformity has come from threatened disparity. "E Pluribus Unum" is in the way of being realized through the adoption by the state of rational laws of this character without doing violence to the principle of state sovereignty.[1]

An interesting example is the effect of the Federal Grain Standards Act and the Warehouse Act, 39 Statutes at Large 486, on state legislation.

The Grain Standards Act authorizes the Secretary of Agriculture to establish grades which he is permitted to alter from time to time. All persons shipping the grains included in the act must conform to these grades. Official graders are provided for and in case of dissatisfaction with a decision in a particular case an appeal is allowed to the Secretary of Agriculture. Provisions for the fixing of standards for similar commodities are very numerous in state acts, but there is an evident tendency to make the state and federal statutes conform.

Washington, Ch. 48, Laws of 1923 requires the Director of the Department of Agriculture to adopt as state standards all grades for grain now or here-

1. For new interstate commerce standards see Recent Federal Legislation, p. 313. American Bar Association Journal, May, 1923.

after established by the United States Department of Agriculture. California in 1921 by Chapter 693 also requires the adoption of the federal grain standards by the Director of Agriculture under his power to grade agricultural products, and in Ch. 718 of the same session provides machinery for securing harmony between federal and state administrations. The State Director of Agriculture appoints his own inspectors, but any person aggrieved by the grading of any such employee may with the approval of the Secretary of Agriculture, appeal to the Grain Supervisor of the Supervision District which includes the state. The supervisor is appointed an employee of the department without pay to hear and decide such appeals. After conferences with the Director of Agriculture his agents and "any other interested parties" and making tests, he issues a "federal appeal grain certificate which shall state the grade of the grain as determined by such tests." This certificate is made prima facie evidence of the correct grade of the grain in any court of the state. Thus this system appears to establish not only a statutory unity but a degree of administrative cooperation which deserves attention.

The federal warehouse act requires warehousemen to be licensed and to furnish a bond to secure the grain stored with them and provides that any person whose grain is injured may sue on the bond in his own name. . . . Iowa, Chap. 19, Session Laws of 1921 which in imitation of the federal act provides for the licensing and bonding of warehousemen exempts from the requirement of a bond "any warehouse licensed and bonded under the provisions of the United States Warehouse Act." Idaho, Ch. 34 of the same year amends its existing warehouse licensing act to exempt also from requirement as to bond, warehousemen who have given bonds under the federal warehouse act "and acts amendatory thereto." Bonds given under the law of the United States are to be taken as "a full compliance with the provisions of this act relative to security for the doubtful performance of the obligations of such warehousemen." Proof that the bond has been filed with and approved by the Department of Agriculture must be filed in the Department of Agriculture of the state.

In the field of interstate commerce there is no conflict between federal and state laws in the sense that either may apply to a particular transaction. If it is interstate commerce the states are excluded, at least where Congress has acted, while if it is intrastate commerce, Congress has no authority, the state is sole sovereign. Another situation arises in regulatory legislation under the 18th amendment and in cases where Congress, through the use of the taxing power, has enacted what is in effect a police law regulating a particular business. Where the federal tax is prohibitory, as was the case in respect to oleomargarine and white phosphorous matches, although the state, by its silence, or expressly by a licensing law, permits the use of the taxed article, the conflict is theoretical rather than practical, since there will be nothing left for the state law to operate on if the federal statute accomplishes its purpose by levying a tax high enough to stop production or sale. In cases, however, like the Harrison Narcotic Act where a stamp tax and a moderate tax on professional men using, and dealers in, narcotics, is levied so that the purpose of the act is not to stop but to regulate, transactions in narcotic drugs, a different situation is presented. The act of Congress in no way affects the rights of the states to themselves act for the regulation of the traffic in narcotic drugs and the same transaction may be an offense against both state and federal laws. Here the interest of business and professional men affected by the legislation clearly demands the greatest possible uniformity and the acceptance by the states of the precautions taken by the federal government in the way of orders and prescriptions as a sufficient satisfaction of their own requirements for limitations of trade to the proper channels.

The Harrison Act allows sale at wholesale only on order forms and only to specified classes of persons; consumers can procure the drug only on a prescription or directly from a physician, dentist or veterinarian, except for remedies containing a small amount of the drugs, which is specified in the act. Evidently no one should be compelled to do over again for the state what he has done already for the federal authorities, nor should he be faced with conflicting rules of conduct in the operation of his business. This is the more important, since breach of the rules is a criminal offense.

Under the 18th Amendment the situation is similar. Both state and nation are empowered to pass laws to carry out the amendment, and under the decision in the Lanza case,[2] each is entitled to put in practice its own idea of how the amendment should be enforced. Under both prohibition and narcotic laws, the same transaction may be subject to both federal and state law at the same moment, a different situation from cases arising under the Commerce Clause.

Under these circumstances, the easiest way for the states would be to hold their hands, at least insofar as the federal law covered the subject. But in practice this has not been the policy. President Harding recently gave his view as to the need of state legislation. Referring to the repeal of the New York Prohibition Law, he says: "It will be obvious that many complex and extremely difficult situations must arise if any of the states shall decline to assume their part of responsibility of maintaining the Constitution and the laws enacted in pursuance of it. The states are equipped with police organizations and judicial establishments adequate to deal with such problems. The federal government is not thus equipped."[3] [At the time of writing Governor Smith had not yet signed the repeal.]

If the state must act, a simple process would be to incorporate into the law of the states the federal law. But as the history of all important laws is a history of change, continuing uniformity can only be assumed if amendments made by Congress become the law of the states when they are incorporated into the federal statute. State legislatures, as a rule meet bienially, one even quadrennially, so that until the next meeting of the state legislature, after an amendment by Congress, there would be a variation, perhaps substantial, between state and federal measures. Even the adoption of the act of Congress and its amendments will not secure uniformity. The state must go a step further. An act itself is only a framework. The regulations are expected to make it actually workable, so that to adopt the same act with different regulations would be adding to confusion. If uniformity is to be the goal,

2. 43 Sup. Ct. 141, Decided Dec. 11, 1922, *U. S. v. Lanza et al.*
3. New York Evening Post, May 17.

the appropriate act of Congress, its amendments and the regulations, made under it, in futuro as in praesenti, must be taken over into the state legislative system.

No state has traveled the whole way but several have made long steps upon it. California, Chap. 80, 1921 in section 1, adopts the penal provisions of the Volstead Act "as the law of this state; and the courts of this state are hereby vested with the jurisdiction, and the duty is hereby imposed upon all prosecuting attorneys, sheriffs, grand juries, magistrates and peace officers in the state, to enforce the same." Violations of acts declared unlawful by the Volstead Act or "by the 18th amendment to the Constitution of the United States are subject to the penalties provided in the Volstead Act," under section 2, but the state goes further than adopting the law in force—"Section 3. California hereby recognizes that its power to enforce the eighteenth amendment to the constitution of the United States should at all times be exercised in full concurrence with the exercise of the like power of Congress; and to that end, whenever Congress shall amend or repeal the Volstead act, or enact any other law to enforce the eighteenth amendment to the constitution of the United States, then the provisions of sections one and two of this act shall apply thereto."

The power of cities and counties, however, to prohibit the "manufacture, sale, transportation or possession of intoxicating liquors for beverage purposes is continued." The legislature has thrown out an anchor to windward by declaring that if any section or portion of any section of this act is unconstitutional it intends that "the remainder shall continue in full force and effect."

The state of Nevada by Chap. 37 of the Acts of 1923 adopted exactly the same statute after repealing a preceding prohibition act. The Governor vetoed the first repealer but the legislature passed it over his veto and then proceeded to copy the California Law.

Washington's new narcotic act, adopts in part the same procedure. The act makes it unlawful for any person "to sell, furnish or dispose of or have in his possession with intent to sell, furnish or dispose of, any narcotic drugs" except on the prescription of a physician, registered under the laws of Washington and of the United States, but exempts from its application, sales made by wholesalers "in compliance with the act of Congress of the United States and the rules and regulations now in force or hereafter promulgated thereunder relating to the importation, manufacture, and sale of narcotic drugs" to retailers, or by either wholesalers or retailers, to physicians, dentists, surgeons or veterinarians registered under the aforesaid acts and regulations. The possession of any narcotic drug is also "deemed a violation of this act," unless it has been obtained pursuant to the federal laws and regulations and the provisions of the Washington act. Indications are that these laws will not have plain sailing in the courts.

States whose constitutions prohibit legislation by reference, and require that the whole act be set forth in the statute books cannot follow this easy way.[4] The statute to be included must be expressly set forth so that evidently, future amendments or rules cannot be adopted in advance.

Even where this impediment does not exist, the courts deny to the legislatures the right to accept in advance, future acts of Congress. To do so is to delegate legislative power to Congress, and that the state legislatures cannot do, nor can it adopt rules and regulations to be made in the future.[5] The probable result of the Nevada and California statutes is then, to adopt the Volstead act as it stood when the respective state lawmakers acted.

The Maine statute, Public Laws 1919, Ch. 235 held unconstitutional in State v. Intoxicating Liquors[6] introduces a new element into the situation. It declared intoxicating "any beverage containing a percentage of alcohol which by federal enactment, *or by a decision of the Supreme Court of the United States,* now or hereafter declared, renders a beverage intoxicating." Incorporating by reference into the law, a future decision of the Supreme Court is a decided novelty, and though the point was not raised, it is not hard to foresee the fate of such a delegation of power.

Court decisions, however, will add to the confusion of states adopting federal statutes. A decision of the Federal District Court in New York, not yet reported, held void that part of the Volstead act limiting the amount of medicine which may be prescribed by physicians. One ground for the ruling was that the 18th amendment gave Congress general police power over intoxicating liquors "for beverage purposes only," that liquor used as a medicine was not used "for beverage purposes," and that therefore this provision was beyond the power af Congress. Unless, however, the police power of the states has been changed by the 18th amendment, it is not limited to liquor for beverage purposes, but may extend to a reasonable regulation of the medical use of whiskey, so that the section of the Volstead act stricken down by the District Judge as beyond the power of Congress, may be within that of the states. Therefore a California or Nevada physician may be bound by the limitations of the Volstead act as a state law, though he is free from its bonds as a federal act.

Evidently it is scarcely possible to secure complete identity of the laws of the several states and of the United States by the amalgamation of the federal laws into the systems of the states, so that the same subject will be governed by an identical rule in every state. The adoption by states of Congressional models, however, dealing with narcotics and prohibition, has led to a very wide degree of uniformity in regulation over the country which has been of great importance to business men.

4. *Commonwealth* v. *Dougherty*, 39 Pa. Sup. Ct. 339.

5. 133 N. E. 453; *State* v. *Intoxicating Liquors*, 117 Atl. 588; *Santee Mills* v. *Query*, 115 S. E. 202. *Note:* Doubt has been expressed as to whether the legislature can adopt federal rules and regulations even if existing at the time of the passage of the act. *Commonwealth* v. *Kephard*, 17 Pa. D. R. 1051.

6. Cited note 1, *supra.*

The Negro Migration

"If the negro is needed and wanted in the North and can find better wages and conditions, we would not hinder him from securing these things. We think many will fail and be disappointed; but they have a right to satisfy themselves. Then if the North has the negro there will be a fuller understanding of the problems of the South. If the North can take the negro and improve his condition and relieve the South of the race problem, we should cooperate. Every negro in the South occupies a place that could be better filled by a white man, and every Negro who goes North will release a white man who might be enjoying greater opportunities in the South."—*Arkansas Methodist (Little Rock)*

DECISIVE BATTLES OF CONSTITUTIONAL LAW

V. THE DARTMOUTH COLLEGE CASE

(The Trustees of Dartmouth College vs. Woodward, 4th Wheaton 518)

By F. DUMONT SMITH
Of the Hutchinson, Kansas, Bar

I HAVE not followed the strict chronology of Marshall's decisions. Gibbons vs. Ogden was later than the Dartmouth College case. I preferred to group together the four great case, Marbury vs. Madison, Cohen vs. Virginia, Bank vs. Maryland and Gibbons vs. Ogden, because these four decisions established the power of the Federal government and are the corner stones upon which the whole edifice rests.

I turn back now to 1819 to consider the Dartmouth College case. This is the most famous of all Marshall's decisions. It is more widely known among laymen than perhaps any other case in the Supreme Court reports. It has been more praised and more criticized, more blessed and more banned than any other of his great cases.

Dartmouth College was founded by the Reverend Eleazer Wheelock, who had established on his own estate a school for Indians that was highly successful. In 1765 he sent Nathaniel Whitaker to England to secure donations. Whitaker secured over eleven thousand pounds and shortly thereafter the Crown granted to the College a perpetual charter, naming it after the Earl of Dartmouth, who was one of the principal donors. Twelve trustees suggested by Wheelock were named in the charter who had complete and autocratic control of the affairs of the College, with power in a majority to select the successors of any who died or resigned. Wheelock became president and the charter gave him power, at his death, to appoint his successor. He died in 1779 and by his will appointed his son John, who was then but 25 years of age and had been a colonel of the Revolutionary Army. The College was established on the Connecticut River in Western New Hampshire, and as the charter provided, open to whites as well as Indians. Large donations of land were given to it and it speedily became one of the chief seats of learning in New England.

War broke out between the Congregationalists and Presbyterians. Wheelock, the president and Bellamy, one of the trustees became bitter enemies. Very shortly the issue became political. The Federalists on one side, the Republicans on the other. A war of pamphlets was waged between the two factions, and the whole state of New Hampshire engaged on one side or the other. Undoubtedly this state of affairs was very injurious to the College.

In 1816, the Republicans being then in power in New Hampshire, a bill was passed for the management of Dartmouth College, which changed the name of Dartmouth College to "Dartmouth University," increased the number of trustees from 12 to 21, nine to be appointed by the governor, established a board of overseers of 21 members, of which the governor and other state officials were ex officio members. The practical effect was to annul the old charter, completely deny the intentions and wishes of Wheelock and the original donors, and make the control of the University completely political. A majority of the old trustees refused to recognize the new government and when forced to leave the College buildings, kept up their tuition in town, most of the students following them. A suit was brought by the trustees of the College against Woodward the secretary of the University, in trover, to recover the seal of the College, the original charter and other papers. The Supreme Court of New Hampshire decided in favor of the University. The case was appealed to the Supreme Court of the United States. Holmes, a member of Congress, but a very inferior lawyer, and Wirt, then Attorney General, appeared for the University. Webster and Hopkinson of Pennsylvania, for the College. Webster never appeared in a case where his whole heart and soul were so deeply engaged as this. He loved his College. He was a Federalist and the Republicans were, as he believed, seeking to destroy his Alma Mater.

Although conceding that the court could only consider the question whether the Act of the New Hampshire legislature was invalid under the contract clause of the constitution, Webster devoted the most of his argument to general consideration, arguing that the Act was against abstract justice, against the law of the land and a denial of a property right, elaborating the early history of the College. His argument on the constitutional phase is brief but masterly. Holmes made a stump speech. Wirt acquitted himself poorly, while Hopkinson, for the College, made one of the best of his great arguments. It developed in consultation that the judges were divided. The case was taken under advisement and was not decided until February, 1819.

Beveridge's story of the case from here on is curious and interesting. Marshall, Story and Washington were for the College. Duvall and Todd were against it, believing the Act valid. Livingston and Johnson were in doubt. Webster, himself, had little confidence in winning the case. This seems strange when we remember that in Terrett vs. Taylor, 9th Cranch 45, the court had held that a state could not revoke a private charter, and in Fletcher vs. Peck, 6th Cranch 87, it had held that the state could not revoke a grant of land even though procured by the open corruption of the legislature that passed the Act; and in New Jersey vs. Wilson, 7th Cranch 166, a contract between New Jersey and certain Delaware Indians, a grant before the Revolution, was held sacred.

Apparently the case hinged on whether the College was a public or private corporation. The whole controversy in effect settled on that. If it was a public corporation exercising political power the legislature could amend or revoke its charter. If it was a private corporation the court was bound by its previous decisions to hold the charter intact.

Webster's argument was printed in pamphlet form, widely circulated and generally approved. Livingston and Johnson apparently consulted Chancellor

Kent sometime during that summer and he endorsed Webster's logic.

The officers of the University who had expected an easy victory became alarmed and employed Pinckney, then at the height of his fame. Pinckney let it be known that he intended to ask for a reargument after it had leaked out that the court was divided, some of the judges doubtful. On the first day of the February 1819 term, Pinckney having spent a week in preparation, appeared to ask that the case be reopened. Marshall apparently not knowing that Pinckney was on his feet and about to address the court, although Beveridge says that his purpose was well known to the chief justice, much to the disgust of Pinckney, calmly proceeded to read the judgment in favor of the College, five judges agreeing. After reciting the history of the College and describing its charter, Marshall considers one of the contentions of counsel for the University, that not every contract is covered by the clause of the constitution. He admits this and says, "the provision of the constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice." He holds that the College is possessed of such a right; that the trustees, although serving as such without pay, and without interest save as trustees, could assert this right.

Coming to the nature of the contract he thus states the question:

> If the act of incorporation be a grant of political power, it it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.
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> But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, although neither the persons who have made these stipulations nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed, while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives, in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.
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> It becomes, then, the duty of the court most seriously to examine this charter, and to ascertain its true character.

He then discusses the question of education, the public interest in it, but denies that it is altogether in the hands of the government, or that donations for the purpose necessarily become public property, subject to the will of the legislature. Then comes his famous description of a corporation and its effects.

> Among the most important are immortality, and if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law, for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

He then distinguishes between public and private corporations. He defines the former as those and those only, which exercise political power and he makes the assertion, somewhat startling to modern ears, that a corporation, not exercising political power, can no more be controlled by the legislature, than a private individual, carrying on the same business. The modern assertion of the police power of the state over corporations, has rendered all this portion of the decision entirely obsolete. He then considers the question whether this charter is a contract.

> This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.
>
> It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution when the clause under consideration was introduced into that instrument. It is probable that interference of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be some-

thing in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the constitution in making it an exception.

Story assented and wrote one of the best of his many opinions. Marshall, as usual, cited no authority. Story's opinion bristles with them and he uses one illustration, that unlike most illustrations, is as conclusive as an argument. He says:

> If a grant of land or franchises be made to A, in trust for special purposes, can the grant be revoked and a new grant thereof be made to A, B and C in trust for the same purposes, without violating the obligation of the first grant? If property be vested by grant in A and B, for the use of a college, or a hospital, of private foundation, is not the obligation of that grant impaired when the estate is taken from their exclusive management, and vested in them in common with ten other persons? If a power of appointment be given to A and B is it no violation of their right to annul the appointment, unless it is assented to by five other persons, and then confirmed by a distinct body? If a bank, or insurance company, by the terms of its charter be under the management of directors, elected by the stockholders, would not the rights acquired by the charter be impaired if the legislature should take the right of election from the stockholders, and appoint directors unconnected with the corporation? These questions carry their own answers along with them.

To measure the effect of this case one must consider the conditions of it. Public and private credit were at a low ebb. Times were hard. Debts loomed large and many were the schemes for their direct or indirect repudiation. Legislatures were passing Stay Laws, Insolvent Acts and depreciating bank notes were destroying the obligation of pecuniary contracts. Marshall was a fanatic on the subject of plighted faith, whether public or private. To him a contract was a sacred thing and throughout his long career he sternly held to these views, going in many cases to extremes, from which the court later retired. Immediately following this decision, the states began either by their constitutions or legislative enactments, attaching conditions to the charters of every corporation, so that now almost universally a corporation charter may be amended or repealed. So the sacredness of a corporation charter has almost entirely disappeared. The growing police power of the states now regulates, overregulates, every corporation, public or private, but the decision was of overwhelming importance to capital in protecting its investment, its security and freedom from political control of chartered companies. Much of the extraordinary financial development of the country for the ensuing half century is due to this great decision.

THE COLORADO RIVER PROBLEM—II

Consideration of Details of Agreement Negotiated by Representatives of Seven Western States and Ratified to Date By All Except Arizona—Apportionment—Terminology*

By N. E. CORTHELL
Of the Laramie, Wyoming, Bar

The Compact

FROM every consideration of policy and economics the desirability of a compact between the seven Colorado River states, approved by Congress, is evident. In no other manner can a rule be established having the force of a stable, continuing law or contract of general authority with respect to the subject matter. (Art. I, Sec. 10 Constitution of U. S.). The mere legislative authority of Congress alone is inadequate; and an agreement between the states alone is not only inadequate, but is forbidden without the consent of Congress. With every favorable predisposition then in favor of such a compact, we should approach the consideration of the agreement negotiated in this case.

On the other hand since such a Compact will become the law of the River, and especially since it will be practically an unalterable law, like the fabled laws of the Medes and Persians, it demands far more than the usual consideration which is accorded to ordinary State legislation, alterable by future legislatures. It would be a crime—a crime amounting to treason against the state, to let it pass without the most thorough and searching deliberation and criticism. No consideration of official amenity or interstate courtesy should stand in the way of this criticism; neither should the states concerned be hurried into an undigested, ambiguous or uncertain compact by the natural haste of the Southern California interests. Just and fair deliberation and accommodation are all that any interest concerned has the right to demand or expect.

I have been furnished with a copy of the Compact through the courtesy of Mr. Emerson and also with an advance extract from his Biennial Report, explaining the Compact. The Compact is comparatively brief. It consists of eleven articles. While an exhaustive discussion would demand a minute and detailed analysis of each of these articles, such treatment is incompatible with the scope of the present paper. Article 1, expresses the general purposes of the Compact. Article 2 is devoted to lexicography, defining the terms "Colorado River System," as the American portion of the basin, "Colorado River Basin," as the American area drained *or served* by the stream, "States of the Upper Division," as Colorado, New Mexico, Utah and Wyoming, "States of the Lower Division," as Arizona, California and Nevada, "Lee Ferry," as the point one mile below the mouth of the Paria River, "Upper Basin," and "Lower Basin," as the parts of the "Colorado River Basin" respectively above or below Lee Ferry, and "Domestic Use," as including household, stock, municipal, mining, milling, industrial and other like purposes, excluding the generation of electrical power. While several of the definitions invite criticism, it is believed that most of them may

*This is the conclusion of an address delivered by Mr. Corthell at the annual meeting of the Wyoming State Bar Association held at Cheyenne on Feb. 11 and 12, 1928. The first part of it dealing with "The Facts" and "The Law" was printed in the May, 1928, issue of the Journal.

be dismissed from the present discussion with a very brief reference in other connections.

The Compact, as I have said, divides the seven states concerned into two divisions. The "Upper Division," states are Colorado, New Mexico, Utah and Wyoming, and the "Lower Division" states are Arizona, California and Nevada. "Lee Ferry" is the dividing point on the river between the Upper and Lower Basins. This point is apparently a well-known land mark, a very short distance below the Utah-Arizona boundary, and near the upper end of the great Gorge. There are apparent physical reasons for this division, which perhaps do not need further explanation at this time. As will be subsequentlly shown the Compact becomes, by reason of this division, practically a bilateral agreement between Colorado, New Mexico, Utah and Wyoming on the one hand, and Arizona, California and Nevada on the other, though the distribution of water between the "Upper Basin" and the "Lower Basin" hereinafter to be mentioned, does not coincide in all respects with this division of the states.

The terms "Upper Basin" and "Lower Basin" are misnomers. They are not confined to the drainage area of the river but are defined rather paradoxically to include not only the area within the River Basin, but any areas in the signatory states outside the Basin which may be served from within the basin. They *exclude* Mexico.

The definition of the term "Domestic Use" seems particularly objectionable since it is made to mean not only household and stock uses, but "municipal, mining, milling, industrial and other like uses," excluding only "the generation of electrical power." It is well to explain that the term "Domestic Use" is employed in the Compact only in Art. IV to give precedence over navigation and electrical power uses. And in subdivision (e) of Art. III providing that the upper division shall not withhold or the Lower division require delivery of water "which cannot be reasonably applied to *domestic* and agricultural uses." There would, however, appear to be no reason why the term should be employed in a different sense for these purposes from the practically universal sense in which the term is used elsewhere in connection with water rights. Only confusion and possibly annoying disputes and litigation can result. It is far broader even than our own statute definitive of the term (C. S.833); and broader yet in comparison with the meaning attached to it in other states. (Montrose Canal v. Loutsenheizer Ditch Co. Colo.; 48 Pac. 532, 534. Crawford Co. v. Hathaway, Nebr.; 93 N. W. 781, 797.)

The use of water for *domestic* purposes is essentially a restricted use under the riparian rule. An upper riparian owner may *consume* water for "domestic" purposes even though it deprive the lower riparian owner of the like or equal privilege; but he cannot do this for other than "domestic" purposes. Under the appropriation doctrine some states by constitutional or statutory provisions give preference to domestic use, even as against priority of appropriation. Hence the importance of restricting the meaning of the term to its universal and proper import of household purposes, such as drinking purposes for man and beast, culinary, laundry and bathing purposes, and other personal, vital and narrowly restricted uses. (1 Weil on Water Rights, Secs. 740, 741. 2 Kinney on Irrig., Secs. 791, 795.)

Even if the definition contained in the compact could certainly be restrained to the purposes of the Compact, and within the limits of present methods and means of employing water for municipal, mining, milling, industrial and other like purposes it would be a gross departure from the common understanding of the term. It would be idle to speculate how far the use might be expanded by future developments and changes in the method and extent of use for the purposes mentioned. There would seem to be sound reasons why the distinction between "Domestic Uses" and "Preferred Uses" should be preserved.

Article 3 may be considered to be the meat of the Compact. It deals with the apportionment of water between the Upper and Lower basins. No attempt is made to apportion, or to establish any rule for the apportionment of, water between the respective states, except as such apportionment may result from the division between the two basins; that is, the Compact does not purport to regulate the rights of Wyoming and Utah, or of Utah and Colorado, or of Colorado and New Mexico, or of any two of the states in the Upper division as between themselves. The same is true of the states in the lower division. Doubtless this is a wise and necessary limitation on the scope of the Compact. It appears to me that the general plan of creating two divisions and apportioning the water between them is a natural outgrowth of the physical conditions.

However, it is of the very highest importance to exercise care and circumspection in apportioning the water between the two divisions since any mistakes in this allocation would be irreparable and indeed may not become apparent for many years. The Compact itself does not exhibit the basis on which the allocations are made; that is, it does not show the estimated volume nor the sources of flow from which the Commission calculated its results, nor the estimated amount consumed by present appropriations, nor the estimated extent of future needs in the two basins. In Mr. Emerson's report the average annual flow of the Colorado River system is estimated at 22,000,000 acre feet, and it is said that 16,000,000 acre feet are allocated under the terms of the Compact, leaving a residue of 6,000,000 acre feet to be apportioned at a future date.

I have not been able to find any data corresponding with these estimates. Mr. Emerson, in his report for 1919-20, refers to the annual flow as 16,000,000 acre feet. In Senate Document 142, above referred to, at page 5, is set forth a tabulation of the discharge of the river at Laguna Dam from 1899 to 1920 inclusive. The Laguna Dam is located just above the delta of the river and below the confluence of all tributaries, except the Gila. The average annual discharge at the Dam for the 22 years is reported as 16,400,000 acre feet, varying from 9,110,000 in 1902 to 25,400,000 in 1909. The available data on the flow of the Gila indicates an annual discharge of 1,060,000 acre feet. These figures are from the records of the U. S. Reclamation Service and apparently are the only records used. It would appear then that the amount of water subject to apportionment, instead of being 22,000,000 acres feet annually, does not exceed 17,500,000. During the period covered by the record rather extensive appropriations were in progress, and we might add one million acre feet to cover the estimated average amount consumptively used during that period above Yuma, and therefore, not appearing in the recorded flow.

But the Compact, instead of apportioning the flow at the mouth of the Gila, apportions it at Lee Ferry. So far at least as the text indicates, that is the only

point where any division is intended, and is the only place where the apportionment is at all practicable of execution. From what I have been able to learn no measurements have been made or records kept of the flow at Lee Ferry. However, there are two methods of approximating the flow at that point. The first method is by deducting from the flow at the Laguna Dam the amount supplied by tributaries between the Dam and Lee Ferry. There are no complete figures of this inflow, but it apparently amounts to more than five hundred thousand acre feet annually. Computed on this basis the flow at Lee Ferry would be approximately 15,900,000 acre feet. There are also records of the flow of the Green and Grand Rivers not far above the Junction and of the principal tributaries between the Junction and Lee Ferry. These records are in some cases fragmentary and for short periods, but when homologated with the records at Laguna Dam they seem to indicate a flow at Lee Ferry of about 15,600,000 acre feet annually.

Averaging these two results there is an indicated average annual flow at Lee Ferry of about 15,750,000 acre feet. Yet Mr. Emerson's report indicates that the Commission assumed to apportion or allocate 16,000,000 acre feet; and this is the apparent amount of the specific and definite allocations. Instead then of keeping the specific apportionment within the limits of the indicated flow at the point of division, it would appear that the Commission exceeded those figures. The assumed margin of six million acre feet, if it existed, would be small enough—probably less than prudence would require. It cannot be known that the twenty-two year record establishes a safe and dependable average. The Reclamation Service itself questions the accuracy of the record in the earlier years. The known imperfections of measurement and observation, as well as the enormous variation in stream flow which is known to occur over long periods of time suggest caution even in ordinary projects, and even though they may be temporary in their character. Where, however, as in this case, the apportionment based upon these data is "in perpetuity" and where it affects subjects and interests of such vast and unknown value, the need of caution is multiplied many fold.

The United States Supreme Court expressly recognizes these elements in its recent decision in the case of Wyoming vs. Colorado, above cited. Voluminous estimates of stream flow submitted by Colorado were characterized by the Court as insufficient and unreliable data upon which to base an apportionment. Furthermore, the Court directed attention to the unreliability of a so-called "average" or "normal" flow shown by stream flow records as a basis for practical calculations. The Court was called upon in that case to determine the amount of the *available* annual flow of the Laramie River, for the purpose of apportioning the water between Colorado and Wyoming. It felt constrained to reject the figures for several years of highly excessive flow on the ground that such rare and occasional flow was not, *in a practical sense available*, but only the fairly continuous and dependable flow. The result was the establishment of an estimated average *available* flow much lower than the witnesses on either side proposed.

In the records of the flow of the Colorado River above referred to, it appears that while the annual flow for each of two years was below ten million acre feet, the annual flow in at least six other years of excessive discharge was so distributed that not all, if any, of the excess flow would be practically available. If we were to reject only the two years of highest flow it would reduce the average by some 750,000 acre feet. Again the 5-year period from 1901 to 1905 inclusive indicated an average flow at Laguna for that period of only 12,300,000 acre feet, which would mean approximately 11,800,000 acre feet at Lee Ferry, or 4,000,000 less than the average for the 22-year period. But the Lower Basin is by the Compact specifically allowed 8,500,000 acre feet, which, unless it includes the Gila, would leave only 3,300,000 acre feet for the Upper Basin, and for other requirements presently to be mentioned. It is possible to select even ten year periods in the 22-year record which would show a substantial diminution of the average.

But the Compact makes provision for further allocations of water below Lee Ferry. In order that the scope and effect of Article 3 may be more clearly perceived, it is here set forth:

ARTICLE III.

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(Subdivisions (f) and (g) provide for further equitable apportionments after October 1, 1963, but as these provisions are dependent upon a new compact and legislative ratification, they are not presently operative or significant).

The direct, present, specific apportionments are found in subdivisions (a) and (b). Presumably the additional apportionment of one million acre feet to the Lower Basin in subdivision (b) is intended to dispose of the average annual flow of the Gila, which is approximately that amount. The Compact does not make this clear. The Upper division is interested in the Gila only because it apparently contributes a material amount to the main stream at Yuma, which would, therefore, be available for the Imperial Valley Canal and for other lands in Mexico; but it seems very doubtful if the Gila will provide any ultimate surplus after satisfying the needs within its own drainage basin. For this specific reason, as well as on all accounts, the Compact should expressly show whether the additional apportioned in subdivision (b) may require an additional flow at Lee Ferry.

It should be assumed I think that the Compact vests a present right to a flow theoretically of one-

half (up to 7,500,000 acre feet) of the supply of the river from sources above Lee Ferry, and in the absence of any specific statement as to the sources of the additional one million acre feet per annum apportioned to to the Lower Basin, it should be assumed that the Lower Basin may be entitled to that amount in addition to the apportionment in subdivision (a). There is nothing in the Compact, unless it be the order of the paragraphs, which would indicate that the additional apportionment to the Lower Basin is in any way subordinate to the first apportionment. In years of diminished flow this might become an acute controversy.

In subdivision (c) of Article III provision is made for the contingency of an allowance by the United States to Mexico for use in that country; and notwithstanding the unequal apportionment in subdivisions (a) and (b), it is provided that the Upper and Lower divisions shall equally bear the burden of any deficiency and that the Upper Basin shall deliver at Lee Ferry one-half of such deficiency. An examination of the geographical situation seems to indicate that Mexico should be considered a part of the Lower division and that the apportionments to that division are sufficient to supply the needs on both sides of the international line. A further reference will be made to this subject in another connection.

In Article VII it is provided that "nothing in this Compact shall be construed as affecting the obligations of the United States of America to Indian tribes." While the full effect of this article is not easy to discern, it seems probable that the Upper division might be called upon to furnish at least its proportion of the water for Indian lands, and that this proportion in times of shortage might have to come from the apportionment to it in subdivision (a) of Article III. In effect this would probably result in an additional apportionment to the Lower Division since there are some ten or twelve Indian Reservations situated upon the streams of that division, while there are none upon the streams in the Upper division except the Southern Ute Reservation on the San Juan River and a part of the Navajo Reservation near the Junction of the San Juan with the Colorado. Apparently the irrigation needs of Indian lands may be very large. The Compact should deal more adequately and particularly with this subject.

In Article VIII it is provided that "whenever storage capacity of five million acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, the claims of present perfected rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored *not in conflict with Article III.*"

To this provision is added a further one that "all *other* rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situated." This latter provision is a reaffirmation of a similar one stated in different form in subdivision (a) of Article III. The Compact itself, of course is not intended to secure, nor will it secure, provision of the five million acre feet of storage capacity mentioned. Presumably the Commission had in mind the probability or at least the hope that Congress would provide the storage; and as the proceedings at the various meetings and conferences indicate it is probably expected that such provision shall be without charge to irrigators. The Compact is understandable and plausible in that view, but hardly so in any other contingency. It is not to be presumed that storage will be provided by private interests without charge. The contingency of a charge for such service does not seem to be provided for in the Compact.

The phrase "not in conflict with Article III," in connection with the reference to storage does not convey an unequivocal meaning. It may mean that the contemplated storage shall not interfere with or be taken from the apportionment of 7,500,000 acre feet to the Lower Basin. It may mean on the other hand that such storage is within, and therefore, consistent with the apportionment. These interpretations are quite the opposite to each other in their effect; but both seem more or less consistent with the language employed. Assuming that the storage will be provided, it is of great importance to the Upper Division whether it is to be taken as a part of, or as additional to, the present position apportionment. There would seem to be no reason why all present rights in the Lower Basin should not be taken care of, as the language of subdivision (a) of Article III clearly imports, out of that apportionment; just as present rights in the Upper Basin are to be taken care of out of its present apportionment. It is very important that this ambiguity should be removed. I think too it should be made clear whether the storage provided for means *any* storage *howsoever* provided, or only *free* storage to be provided by the government.

In subdivision (d) of Article III, it is provided: "That the states of the Upper division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of seventy-five million acre feet for any part of the ten consecutive years," etc. Taken in connection with the apportionment in subdivision (a) this might be construed to mean that a delivery of seventy-five million acre feet in the aggregate, however distributed over the period of ten years, would satisfy the apportionment. On the other hand, it may be taken as a merely cumulative or additional safeguard for the Lower Basin; and in this view to assure the Lower Basin not merely that it shall receive seventy-five million acre feet during the ten year period, but that it shall receive one-half plus one million acre feet of each separate year's flow. Whichever of these meanings may be the true one, it is clear that the general effect is one of assurance to the Lower Basin at the expense and risk of the Upper Basin. As the flow in the Lower Basin is likely to be more uniform and free from yearly or seasonal variation than the flow in the Upper streams, and tributaries, due to the more widely extended sources from which the Lower river draws its supply, it seems likely that the problem of a uniform flow in the former region is more of a theoretical one than a practical one.

Attention is invited to the term *"consumptive use"* in connection with the apportionments in this article, doubtless used here to distinguish such uses as irrigation from power uses, etc. This term, as applied to irrigation, has a well established meaning, indicating the net use of water at the place of application. It thus means the gross diversion, less losses by evaporation, seepage, unutilized return-flow, etc.—virtually the evaporation through plant life. The apportionment of a given quantity for "consumptive use" may, therefore, require a much larger quantity to be supplied, since losses are inevitable and universal. Even if the apportionment were equal in quantity, this might operate to the prejudice of either division, especially the Upper division, since presumably the recapture of

the return-flow will be relatively greater there than in the Lower division. It would seem that the apportionments should be made in terms of *diversion*, or at least of gross application, rather than in terms of net consumption.

The Compact placates Colorado in the matter of extra watershed appropriations, while it quiets perhaps some uneasiness on the part of the Imperial Valley by its definition of the term "basin" in Article II, as including not only the drainage area, but "all other territory within the United States of America, to which the waters of the Colorado River System shall be beneficially applied." There are supposed to be many potential diversions and uses of this character from the Western slope to the Eastern slope of Colorado, as there are already a few. The Imperial Valley in California does not drain into the Colorado River; quite the contrary. It falls some three hundred feet from the river to the Salton Sea in the bottom of the depression. These two states, therefore, and perhaps others, are greatly interested in the indefinite expansion of the "basin" due to this definition. So far as I am informed there is no practical opportunity for diversion from the River basin in Wyoming. We are, therefore, recognizing a practical right on the part of other states, which is merely theoretical and wholly impracticable on our part. This perhaps admits of no remedy, but I invite attention to it because it is in some sense a new departure, which would not be recognized or tolerated in states recognizing the doctrine of riparian rights.

In this connection it is to be remarked that the Compact furnishes no continuing rule, nor one of general application either to the Colorado River or to any other stream. It deals presently with positive apportionments, supposedly of a part, but possibly of all, of the flow of this River System. It is true that it points out and promises a method for similar future apportionments. But these are not made obligatory in any effective sense. They amount to no more than a promise to try.

As between the states of the Upper division and those of the Lower division, the Upper states seem to be made endorsers for one another. Without any attempt at apportionment of responsibility they jointly agree to assure certain results to the Lower division in respect to the flow of the stream. It is quite conceivable that embarassing questions might arise between the Upper states as to the proportions and extent to which they might severally be called upon to perform these obligations, and how far each was responsible for the others. Possibly there is no way of overcoming this difficulty; but it should none the less be foreseen and calculated upon as one of the factors of the Compact.

The general subject of apportionment of the flow cannot be adequately dealt with or considered without taking account of the apparent needs of the two divisions. Referring again to Senate Document 142 it will be found that effort has been made to ascertain the amounts of irrigated and irrigable lands in areas accessible to the river. Combining these estimates according to their division between the Upper Basin and the Lower Basin, it appears that in 1920, 1,526,000 acres were under irrigation in the Upper Basin, and 508,000 acres in the Lower Basin, to which latter amount should be added 190,000 acres in Mexico, making a total of 698,000 acres below Lee Ferry. Adding to these totals the estimated additional acreage of ultimate irrigation development we have little more than four million acres above Lee Ferry as against a little more than two million acres in both the United States and Mexico, below Lee Ferry. It is claimed, and is probably true, that the actual consumptive use of water on the lower lands, down stream, is much greater, acre for acre, than on the higher and more northerly lands on the upper part of the stream. It is most doubtful, however, if the acre needs in the lower basin are more than twice as great as in the upper basin, in which event an equal division of whatever amount of water may be available from time to time would seem to do full justice to the lower division; and in such apportionment Mexico, the Indian Reservations and all other extraneous needs below Lee Ferry should be included.

The Indian Reservations, irrigable from the main streams, are riparian to the river in the lower division. They are included in the irrigated or irrigable acreage above given. The Mexican area is also included in the above acreage of irrigated or irrigable lands in the lower division; and to a very considerable extent these lands in Mexico are served, as has already been mentioned, by the same canal which waters the land in California. Apparently the same interests are concerned in a large portion at least of the Mexican area as in California. The political division is in fact altogether an artificial one, and will probably cut very little figure in the practical distribution of the water. The Mexican and California areas are adjacent, and in many ways interdependent upon each other for water service, transportation and other needs. Together they form a single and rather isolated industrial and economic area.

In any apportionment which is to be executed at Lee Ferry these relative acreages should be kept in mind. There should also be kept in mind the accessory flow of the river from sources below Lee Ferry, amounting to more than five hundred thousand acre feet in the basin of the main stream, and more than one million acre feet from the Gila. While all these factors should be taken into consideration, and assigned their due weight, it will probably be necessary in the end to deal with the flow and make the apportionment at Lee Ferry. That seems the only practicable place to measure and effect the apportionment to the lower division. The apportionment to the upper division must be determined by what is left, since there is no practicable way of gauging the flow of every tributary and all sources above the points of diversion or use, and thus to ascertain the proportion or amount of water which may be put to use in the upper division.

The considerations touched upon in this paper are not by any means the only ones suggested by, or involved, in the Compact. The subject is one which is susceptible of indefinite expansion. This paper should not be regarded as an undertaking of so ambitious a nature as a full analysis and exposition of the questions involved. Moreover, the paper doubtless involves mistakes of fact, as well as of conclusion. The main purpose which has been sought is to stimulate general thought on the subject at a time when such thought is vital to the interests of the Commonwealth.

Search and Seizure

Prohibition agents must specify what part of a particular building they intend to search when they obtain search warrants, and not merely give an address, the United States Circuit Court of Appeals at New Orleans, La., ruled in a decision handed down in the case against Roma Pressley, proprietor of a shoe shop at Bagdad, Fla.

POLITICAL AND ECONOMIC REVIEW

Public Utility Valuation

IT has long since become a commonplace of rate regulation that to judge the reasonableness of rates by the return they yield on the value of the property is to reason in a circle, for the value is the result of the rates charged. This has become a commonplace among all who have really given thought to the matter. Even to those whose minds are not adapted to thinking, it has long been clear that *if* the value is measured by the earnings, there is circular reasoning in the use of that value as the rate-base. This latter variety of intellect, while it deceives itself into thinking that value can be used as a rate-base if *measured* in some other way than by capitalizing the earnings, (as if the method of measurement affected the fact that the value *is* the result of rates), nevertheless perceives the fallacy in judging rates by the return on those elements of value which can not easily be measured in any other way. Courts and commissions of this mediocre ability have long rejected the inclusion of a "going value" *when measured by earning power.* It is as a rule only paid advocates who insist on including such items, and it is perhaps quite legitimate for them to so insist, as it is their function to present every argument that may help their case. Yet the presentation of such clearly fallacious reasoning shows scant respect for the intellectual fibre of the courts. Such an argument is to be found in the May *Aera* (published by the American Electric Railway Association), in one of the installments of W. H. Maltbie's book, "The Theory and Practice of Public Utility Valuation." Mr. Maltbie is described as "Special Attorney on Rate and Valuation Matters for The United Railways and Electric Company, Baltimore, Md." To demonstrate what he considers the error of the Wisconsin Commission's method of adding only accrued deficits to the rate-base, he considers the case of two companies with the same investments, one of which earns more than the other under the same rate, and shows triumphantly that the former is worth more than the latter. Of course the logic of Mr. Maltbie's argument is that any reduction of earnings whatsoever is invalid, for it will "confiscate" part of the value, which depends on the old earnings. Such a conclusion would remove the necessity for using any rate-base at all in rate cases. It would be a conclusion welcome to the companies, but one which they could scarcely hope to attain *in toto.* Hence they do not press it. But by making use of arguments which are illogical on any other assumption than that of the inviolability of whatever earnings the company gets under the old rates, the counsel for the companies hope to include large elements of "intangible values," as well as to get the benefit of whatever increments in land values and the like may accrue. They render lip loyalty to the doctrine that rates must be looked into to determine whether they are excessive. But they hope to defeat that doctrine in as many concrete cases as possible, by adopting an assumption that whatever value the property has under existing rates it is entitled to. Then, to disguise their consequent rejection of the doctrine that rates may be regulated, they measure the value, as a rule, by other tests (reproduction cost and the like), and since there will be some error occasionally in the measurement, there will be occasional cases where the *apparent* adoption of the value test will permit a slight reduction. Mr. Maltbie, however, throws off the disguise when he insists that the companies be permitted to earn a return on a "going value" based on earnings yielded by the existing rates. The fallacy is so transparent in his reasoning as to be unlikely to deceive even the United States Supreme Court. In the same number of *Aera,* however, Charles Rufus Harte, Construction Engineer, The Connecticut Company, New Haven, employs the value fallacy in the more disguised form. He attacks an article which had been reprinted in the January number from the December *American Economic Review,* by Shirley D. Southworth, of Princeton. His attack is partly epithet (he makes the conventional demagogue's use of the word "communistic," though he does not go so far as to intimate that either Professor Southworth, or Princeton University itself, is on the payroll of Lenin and Trotzky), and partly addressed to the merits. His argument on the merits is partly the fallacious one above outlined, partly two specific ones to which reference will be made presently. We must base a return on the value (not cost), chiefly, it seems, because "when property other than that of a public utility is appraised, the Court, the Master, the jury, or the committee as the case may be, takes evidence and fixes its status, not with relation to what it cost, but with relation to what it would bring in a free market, where seller and buyer alike are willing, but not obliged, to deal with the other; in other words, its value." Naturally. When property is *appraised,* we are seeking its value. That is the meaning of the word "appraise." Mr. Southworth's whole point is that in determining what the rate-base shall be, we are *not* appraising. Does Mr. Harte not think that a willing buyer would pay more for a utility property which is permitted to charge a rate that yields large earnings, than he would for one that is not permitted to earn so much? If that is the case, is not the logic of Mr. Harte's argument simply this—that the propriety of the existing rates is to be judged by the existing rates? Where, then, is the power to regulate? Mr. Harte says elsewhere, "when we can measure the worth of the service we shall have a logical foundation, but until that time we shall be brought back, sooner or later, to 'value' as our rate base." Well, can we not measure the worth of the service? If we mean worth to each individual (what the classical economists call "value in use"), we cannot, but nobody would contend that that is what the test should be. But in the sense of "exchange value," what is the difficulty in measuring the "worth"? Is it not precisely the price that the company is charging? Does not this make it still clearer that Mr. Harte is trying to justify whatever earnings the company already gets, and to defeat the whole purpose of regulation?

These fallacies are all so very obvious, and have been pointed out so many times by commissioners and writers of various sorts, that one feels apologetic at thrashing over old straw. As already observed, the use of such arguments shows scant respect for the courts. Yet it might be argued that the courts have done little to justify any other opinion of their intellectual capacity to handle rate cases. As recently as the 21st of May, Mr. Justice McReynolds, speaking for seven of the nine Supreme Court Justices, uttered the dictum in a telephone case brought from Missouri, that the cost of reproduction must be taken into ac-

count, for the reason that the company is entitled to a return on the "value at the present time." Mr. Justice Brandeis concurred in the reversal of the Missouri court, but on the ground that the commission had fixed rates which failed to yield a fair return on the actual prudent investment. This opinion, concurred in by Mr. Justice Holmes, deserves careful study as a contribution to the problem of rate making. The arguments contained in it, as well as the argument so frequently made that to base returns on value is to reason in a circle, received no attention whatever in the majority opinion. But why have an independent judiciary if the judges do not feel free from the annoying trammels of logical thinking? A thoughtful editorial in *The New Republic* for June 6 ("Certainty and Confusion in Public Utility Rates") emphasizes the point made by Justice Brandeis that the actual prudent investment basis would be more serviceable than "present value" as a means of attracting capital, and would make utility investments far less speculative. The editorial concludes, "The majority opinion unfortunately stands for the present as the law. . . . No one who reads Justice Brandeis's opinion can doubt that it outlines the law of the future. Nor can any one doubt that in this direction, not in any other, we shall find a reconciliation of private and public interests in the field of public utilities."

But to return to the two specific arguments used by Mr. Harte against cost as the basis, and in favor of "value." These arguments, in so far as they favor reproduction cost as such, not merely as evidence of value, are not vitiated by the circular reasoning of his more general argument. The first is, that if different companies are built at different times, when the price levels are different, then, on the "investment" theory, the customers of each will pay different rates. If the customers are in different places, what of it? The consumers of water in a locality where it has to be brought great distances would normally pay more than where a supply is immediately available. If the different sets of consumers are competitors of one another, as where three railroads run between the same points, there is a valid objection to having three different rates. But when the fair return on investment is taken as a test, not of the rates alone, but of the total net earnings, the problem can be solved as the Esch-Cummins law attempts to solve it, by permitting each road to charge a rate which yields a return on the investment of the most costly one, but requiring the less costly roads to turn over to the government a large share of the resulting earnings in excess of a fair return on their respective investments. Mr. Harte's other specific objection to investment as the basis, is the argument that property will not be devoted to public utility purposes if an increment is not permitted whereas the same property if used privately, may bring its owner an increment. But this proves too much. It would seem to prove that no owner of land (which may bring an increment in future) will ever sell it for cash, since cash brings no increment. The fact is, of course, that it will take a somewhat larger amount of cash than otherwise to induce a landowner to part with land when there is a prospect of an increment than when there is not. That much is true. But the utility company has to pay cash for its land anyway, whether or not it can itself reap an increment. The real question is whether the prospect of an increment will attract cash from the investor which could not otherwise be drawn so easily — that is, whether the prospect of a possible greater return in the future will attract capital at a present rate of return not only lower than otherwise, but sufficiently lower to make this the most economical arrangement for the public in the long run. The answer to that question requires more sober consideration, and less impassioned rhetoric, than Mr. Harte seems disposed to give it.

In the assertion that there is a fallacy in basing return on value when value depends on return, it may occur to the attentive reader that value does not depend on return if it is measured by cost of reproduction, or cost of reproduction less depreciation. It is doubtless true that cost of reproduction does not necessarily vary with earning capacity. But it does not always measure value. When it does, it is because it measures earning capacity. Any property right in durable capital goods has value because of its anticipated earning-power. When competition is sufficiently keen, if the earning-power should be more than a fair return on reproduction cost, additional capital goods of the king in question will be produced, causing an additional output of products, a lower price for the same and hence a lower earning-capacity for the plant. If a particular piece of equipment adds nothing to earning power, it will have no value except as junk, no matter how much it might cost to reproduce it. It is only as evidence of value that reproduction cost has any relevance, and wherever it does measure value it also measures earning capacity.

It is not meant to be implied that there are no arguments at all against the adoption of "actual prudent investment" as the rate-base. Much can be said for some modification by reason of the sale of securities in the past at a higher figure to *bona fide* investors. Something can be said for a modification to compensate for changes in the value of the dollar—a modification which Mr. Southworth would seem to favor in the article already cited. Perhaps some modification should be made in the standard of "a fair return on actual prudent investment" to encourage efficiency. But the purpose of none of these modifications is attained by adopting reproduction cost, or by committing the elementary fallacies committed by the writers in *Aera* or by the majority of the Supreme Court.

ROBERT L. HALE.

Columbia University.

Advantages of World Court

"When the Oregon bar association endorses the proposal for American adherence to the world court, it voices the opinion not only of lawyers, who are naturally inclined to favor the judicial system, but of practically all thinking people. There are several shades of opinion as to whether and to what extent the United States should associate itself with other nations in resort to political, economic and military means for settlement of disputes and for prevention of war, but for many years there has been practically only one opinion on establishment of a court which shall decide disputes that are capable of decision on accepted principles of justice. The world court, if generally accepted as the means of settling what are classed as justiciable disputes, would eliminate a large proportion of the causes of war or of the occasions which are used as the pretext for war by nations that have aggressive ends in view."—*Portland Oregonian.*

STATE AND LOCAL BAR ASSOCIATIONS

Louisiana Discusses Dividing State Supreme Court into Sections—Mississippi Approves Holding American Bar Association Meeting in London—Oregon Favors Permanent Court of International Justice—Tennessee Members of U. S. Supreme Court to Be Guests of Honor at State Bar Meeting

GEORGIA

Fortieth Annual Meeting of State Association—Committee Appointed to Co-operate With American Citizenship Committee of American Bar Association

The Georgia Bar Association held its Fortieth Annual Meeting at Tybee Island, Georgia, on May 31st, June 1st and 2nd, 1923.

The address of the president was delivered by Mr. Z. D. Harrison, of Atlanta, President of the Association. The annual address was delivered by Hon. W. H. Ellis, of Tallahassee, Florida, Associate Justice of the Supreme Court of Florida. Both these addresses dealt with the public duty of lawyers as the main theme. Interesting addresses were delivered by Hon. S. Price Gilbert, Associate Justice of the Supreme Court of Georgia, on the "Administration of Justice," and by Hon. W. F. Jenkins, Judge of the Court of Appeals of Georgia, on the subject "Technicalities of the Law."

A feature of much interest was the address by Miss Stella Akin, of the Savannah bar, on the subject, "Women's Participation in Public Life." This was the first time the Association has ever been addressed by a woman who was a member. Other interesting and entertaining addresses were: a "Biographical Sketch of Judge Nathaniel Pendleton, the first United States Judge in Georgia," by Mr. Warren Grice, of Macon; address by Mr. W. Irwin MacIntyre, of Thomasville, on the subject, "Unexpected Smiles;" and address by Judge A. W. Cozart, of Columbus, on the subject, "The Silver Lining Without the Cloud."

A feature of the meeting was the address by Mr. R. E. L. Saner, of Dallas, Texas, Chairman of the Committee on Citizenship of the American Bar Association, Mr. Saner's address having to do with the work of that committee. His address was well received. A resolution was adopted endorsing the work of that committee and appointing the Vice-Presidents of the Georgia Bar Association a committee on citizenship to cooperate with the committee of the American Bar Association, of which Mr. Saner is chairman.

Much time was devoted to the discussion as to raising the standards in Georgia of legal education and admission to the bar, the discussion centering around the report of the Committee of the Association appointed to consider that subject. After spirited discussion the matter was deferred and made a special order for discussion at the next meeting of the Association.

A resolution was adopted condemning the election of judges in this State by the people and calling for the appointment of a committee to consider the question of the method of selection of judges and report at the next meeting.

Considerable time was devoted to discussing the work of the Commission on Uniform State Laws and a special committee was appointed to endeavor to get through the next session of the General Assembly of Georgia the Uniform Negotiable Instruments Law.

The following officers were elected: President, William M. Howard, of Augusta; First Vice-President, Jos. E. Pottle, of Milledgeville; Vice-Presidents for Congressional Districts: First, F. T. Saussy, of Savannah; Second, T. S. Hawes, of Bainbridge; Third, John B. Guerry, of Montezuma; Fourth, Robert M. Arnold, of Columbus; Fifth, J. Prince Webster, of Atlanta; Sixth, Willard Burgess, of Gray; Seventh, Paul H. Doyal, of Rome; Eighth, John B. Gamble, of Athens; Ninth, R. B. Russell, Jr., of Winder; Tenth, Jos. E. Pottle, of Milledgeville; Eleventh, Lee W. Branch, of Quitman; Twelfth, J. E. Burch, of Dublin; Secretary, Harry S. Strozier, of Macon; Treasurer, Logan Bleckley, of Atlanta; Executive Committee—H. H. Swift, of Columbus, Chairman; H. A. Wilkinson, of Dawson; Millard Reese, of Brunswick; Marion Smith, of Atlanta.

HARRY S. STROZIER, Secretary.

ILLINOIS

Noteworthy Annual Meeting Held at Peoria—Resolution for Higher Legal Elucation Adopted

The Illinois State Bar Association held its forty-seventh annual meeting at Peoria, Illinois, on May 31, June 1 and 2. In many respects it was the most noteworthy and successful meeting ever held by this very active Association. The weather was favorable, and Peoria is centrally located in the State, which will partially account for the good registration of 400; but no registration figures can portray the eager interest shown in the attendance at all the sessions.

The first day, Thursday, was devoted to registration and to a golf tournament at the Peoria Country Club, which of itself drew a considerable number of lawyers a day ahead of the business sessions. Thursday night the Peoria Bar Association entertained the visiting gentlemen at a dinner and smoker at the Automobile Club, and the visiting ladies at a dinner and theatre party; which events were an index of the hospitality lavished by the local association upon the visiting members of the convention and their ladies to the end of the meeting. Friday the business sessions were taken up, with the annual address of the president, Bruce A. Campbell of East St. Louis, and the reports of officers and standing committees.

Friday night there were held three round table meetings, on corporation practice, local bar associations, and office management, respectively, which were exceptionally well attended for evening sessions. The section on corporation practice was addressed by Alvin C. Margrave and E. S. Robinson, of the office of the Secretary of State, who also undertook to answer all questions pertaining to their respective branches of the administration of that office. The Secretary of State, Louis L. Emmerson, was also in attendance at this meeting.

The Committee on Office Management, in collaboration with a well-known firm of office furnishers,

staged an exhibit of office methods, including forms for all manner of bookkeeping and a complete filing system with a miniature of a model vault.

Saturday was devoted to an open forum on questions of especial interest to the profession. These questions were in most instances suggested beforehand by members of the Association, who were requested to lead in the discussions. Chief Justice Thompson of the Supreme Court outlined the methods of operation in that tribunal. A bill pending in the legislature, containing a very broad definition of the practice of law and forbidding any corporation or person not a licensed lawyer to practice within the definition was discussed, and a committee appointed to frame a definition of the practice of law.

The system of extending legal aid to indigent clients by action of the local bar associations, inaugurated last year, was commended and continued. Reports were read by the Secretary of the Association from practically all the cities where the plan has been operated, indicating its benefit to the poor litigants and to the profession itself. The plan of annual meetings in each Supreme Judicial District, in operation for the past seven years, was endorsed and voted continued.

One matter which had agitated the Association for nearly two years was settled, which was that of the endorsement of the standards of the American Bar Association for admission to the bar. These standards were strenuously resisted last year as being too stringent, and at this meeting a compromise resolution was presented, and after much heated debate adopted. It provides for pre-legal education of two years of college or its equivalent, and defines such equivalent and the manner of establishing it. It also requires a legal education covering certain enumerated subjects and provides that proof of such legal education shall be made in one of three ways: (a) by certificate that the applicant has pursued his law studies for not less than three years, with a certain minimum of class room hours, in a law school accredited by the Board of Law Examiners as in good standing and has passed a satisfactory examination in such studies; (b) by showing that applicant has pursued in good faith for four years in the office and under the personal tuition of a licensed attorney, a course of studies prescribed by the Board of Law Examiners as the equivalent of such law school course—the applicant to stand an examination by the Board of Law Examiners once each year during the first three years; (c) in case applicant studies partly in an accredited law school and partly under personal tuition of an attorney, a certificate showing work completed satisfactorily by personal attendance in the law school, and the time employed thereon, will entitle him to a credit, to be deducted from the four year period required of those studying exclusively in a law office.

The final event was the Annual Dinner Saturday night, at which the golf prizes, donated by a dozen law publishers, were presented; the new president, Roger Sherman of Chicago, was installed, albeit by proxy, being himself absent through illness; and addresses delivered by Judge Charles S. Cutting of Chicago and Governor Arthur M. Hyde of Missouri.

R. ALLAN STEPHENS, Secretary.

LOUISIANA

Question of Dividing Supreme Court Into Sections Discussed at Annual Meeting—Resolution Denounces Hooded Mob Violence

The Louisiana Bar Association held its twenty-sixth annual session at Alexandria on May 18 and 19. The four sessions were well attended, the program was attractive, and the general opinion that the meeting was one of the most successful the Association has ever held. The Alexandria Bar made an excellent host and the visiting lawyers and their ladies agreed that their visit had been enjoyable and instructive.

The expression of divergent views respecting the division of the Supreme Court of the State of Louisiana into Sections, as provided for by the Constitution of 1921, was one of the most important features of the meeting. Chief Justice Charles A. O'Niell and Associate Justice Ben C. Dawkins and Mr. Walter J. Burke of New Iberia read interesting and excellently prepared papers on the subject.

Chief Justice O'Niell advocated the sitting of the Court as a whole, without any division into sections, and, in this connection, he said: "I am not in favor of dividing the Supreme Court even into two sections if it can possibly be avoided; but a division into two sections would be a thousand times less objectionable than the calling in of two temporary judges and dividing into three sections. With two sections, every decision would be approved by a majority of the members of the Court. With three sections the decisions would be given by a very scant minority of the members of the Court." Associate Justice Dawkins advocated the Court sitting in three sections until such time as the Court has sufficiently caught up with its docket. Mr. Burke, who spoke from the view point of the practitioner, championed the sectional division plan.

After an extensive discussion by the members of the Bar, a resolution was adopted that it was the sense of the Association that the Supreme Court sit in three sections to hear the argument of cases until such time as it catches up with its present crowded docket.

The Association deeply regretted that one of its guests, Mr. Hiram M. Garwood, of Houston, Texas, who was on the program for an address on Saturday, became suddenly indisposed and was unable to deliver it. Mr. Garwood's paper, however, was read by Mr. Edwin T. Merrick of New Orleans. Its subject was the "Judicial Career of Chief Justice White," and Mr. Garwood portrayed most vividly the true character of his subject. Such a testimonial to the Chief Justice as that in Mr. Garwood's paper is one of which Louisianians may well be proud.

The paper on "Law Enforcement" by E. H. Randolph, of Shreveport, was prepared with much care and listened to with interest. Mr. Randolph was unable to attend the meeting and Mr. Phanor Breazeale of Natchitoches read the paper. The remarks by Attorney General A. V. Coco which related to the same subject matter were received with interest also. Mr. Charles E. Dunbar, Jr., of New Orleans, read a paper on the subject of "Conditional Sales Contracts and Chattel Mortgages," which was very instructive. The subject is an important one to the legal profession and the community.

The annual address of the President, Mr. Fred G. Hudson, Jr., of Monroe, showed a great deal of thought and care in its preparation and his suggestions and recommendations were conceded to be of much

interest to the members of the Bench and Bar. Judge John D. Nix of the Juvenile Court made a short address in which he expounded the inner workings of his Court. Mr. William Waller Young, New Orleans, Secretary-Treasurer, in his report showed the Association's membership enlarged and the finances in good shape. The matter of the publication of the decisions of the several Courts of Appeal throughout the State was exhaustively discussed. The Association will endeavor to have the decisions published.

The reports of the standing and special committees were well prepared, three of the most important being the reports of the Committees on Jurisprudence and Law Reform, Mr. James Henry Bruns, Chairman, New Orleans; Legal Education and Admission to the Bar, R. L. Tullis, Chairman, Baton Rouge; and Local Bar Associations, Joseph G. Medlenka, Chairman, Crowley. The first named committee recommended the appointment of a committee for the purpose of procuring the passage of an act providing for the revision of our statutes, which was adopted. The second recommended the appointment of a committee of three members to consider the establishment of a law review, in co-operation with the faculties of the law schools of Tulane, Louisiana State, and Loyola Universities. This was also adopted.

The Committee on Local Bar Associations reported showing that many local bar associations have been formed recently throughout the state, and that the committee was instrumental in enlarging the rolls of the State Association. The Committee on Uniform State Laws, W. O. Hart, Chairman, New Orleans, proposed legislation, which will be submitted to the 1924 session of the Legislature.

The Association adopted a resolution condemning hooded mob violence.

The following officers were elected for the ensuing year: President, William W. Westerfield, New Orleans; Vice-Presidents—Esmond Phelps, New Orleans, First Supreme Court District; Aubrey M. Pyburn, Shreveport, Second District; R. F. White, Alexandria, Third District; M. C. Thompson, Monroe, Fourth District; Hermann Moyse, Baton Rouge, Fifth District; Ventress J. Smith, New Iberia, Sixth District; Secretary-Treasurer, William Waller Young, New Orleans.

W. W. YOUNG, Secretary.

MISSISSIPPI

Instructive and Interesting Meeting of State Bar Association Held—Resolution Favors Idea of Holding American Bar Association Meeting in London in 1924

What was characterized as "the most instructive and interesting meeting of the Mississippi Bar Association in its history" was held at Biloxi on May 2 and 3. A number of notable addresses were delivered, among them being those by former Senator Joseph W. Bailey on "Our Federal Government," by Judge J. B. Holden, President of the Association, and a paper by Gen. Thomas C. Catchings of Vicksburg on "The Encroachment of Intolerance." Gen. Catchings' paper was read by Mr. John Bruni of Vicksburg in the absence of the author.

At the business session the Association selected Jackson as the place for the next annual meeting; adopted the report of the Committee on the Practice of Law, with a view to speeding up trials in the Chancery Courts of the state; and also decided to make a fuller investigation of the character and standing of applicants for membership in the Association than has heretofore been customary. After a few prefatory remarks by Mr. A. T. Stovall, of the Executive Committee of the American Bar Association, the following resolution relating to the invitation to this organization to hold its 1924 meeting in London was unanimously adopted:

> Whereas the British Bar Association has invited the American Bar Association to hold its meeting for the year 1924 in the City of London; and the American Bar Association desires an expression of opinion from the various State Bar Associations as to the propriety of accepting the invitation so cordially extended;
>
> Therefore be it resolved that it is the judgment of the Mississippi State Bar Association that the invitation should be accepted, because,
>
> 1st: It will enable many members of the American Bar Association to study the administration of a judicial system that is in many respects similar to our own.
>
> 2nd: It will bring lawyers trained in the school of Coke, Blackstone and Mansfield into closer association with lawyers trained in the school of Marshall, Kent and Sharkey, and
>
> 3rd: It will be conducive to international amity between two nations that have much in common.

Officers elected for the ensuing year are: President, Judge R. H. Thompson, Jackson; Vice-President, E. W. Heidelberg, Clarksdale; Secretary-Treasurer, Chalmers Potter, Jackson, re-elected; Delegates to the American Bar Association, T. C. Kimbrough, dean of the law department, University of Mississippi; Judge J. B. Holden, Jackson; Judge Garland Lyell, Jackson; alternates, F. H. Lotterhos, Jackson; V. A. Griffith, Gulfport; Judge A. Teat, Jackson; Executive Committee, Southern District, W. S. Hanley, Hazlehurst; Middle District, R. L. McLaurin, Vicksburg; Northern District, John R. Anderson, Tupelo.

The meeting closed with a banquet at which F. H. Lotterhos, Judge Stone Deavours, Judge Jeff Truly, Ex-Senator Joseph W. Bailey and others made brief talks.

OREGON

State Association Favors Permanent Court of International Justice—Goes on Record in Favor of Higher Legal Qualifications for Applicants for Admission to Bar

At the twenty-first annual meeting of the Oregon Bar Association, held at Portland, May 4 and 5, a resolution was adopted declaring that the organization "favors as a general principle the adjudication of international disputes and favors the proposal that the United States adhere to the protocol establishing the Permanent Court of International Justice at the Hague." Another resolution was adopted asking the Supreme Court to make regulations requiring a three years' course in an accredited law school, preceded by two years of academic training, as a prerequisite for admission to the Bar.

The resolution in favor of the Permanent Court of International Justice followed an address by Charles H. Carey, retiring president, in which he declared that the United States owes it to the world to give a clear indication of what modifications it would recommend to the present World Court plan, "and then put its full force and energy behind such organization as will tend to stability and equilibrium, and provide intervention, conciliation, advice and friendly offices, when this will

prevent or delay war, or afford a cooling time before disastrous conflicts are precipitated."

Other addresses were delivered at the meeting by Dr. Suzzalo, president of the University of Washington, on "Our Changing Attitude Towards the Courts"; by A. L. Veazie, on "Constitutionality of the Oregon Income Tax Law"; by W. D. Whitcomb, on "Federal Income Tax Law and Accountancy." One of the interesting features of the meeting was also a report of a special committee headed by Joseph N. Teal on the recent use of the pardoning power in the state. This report declared that the trouble lay not in the law but in its administration and embodied severe criticism of the Parole Board, declaring that it acted "in startling ignorance" of the provisions of the code. A resolution was adopted endorsing a plan to raise $70,000 for a building for the library of the Law School at the University of Oregon, and favoring an allotment of $35,000 of this sum to be raised among the lawyers of the state. Interesting discussions followed several of the addresses. The meeting closed with a banquet on Saturday night in honor of the seventieth birthday of Justice George Henry Burnett of the Supreme Court. Governor Pierce, Oscar Hayter, Col. J. H. Raley, Judge Lawrence, T. Harris, Wallace McCamant and Justice Burnett were on the program as speakers.

The following officers were elected: President, Fred W. Wilson, The Dalles; Secretary, Albert B. Ridgway, Portland; Treasurer, Hall S. Lusk; Executive Committee—R. W. Montague, Portland; W. M. Davis, Portland; J. Roy Raley, Pendleton; George Wilbur, Hood River; O. D. Ebey, Oregon City, Vice-Presidents—Frank W. Calkins, G. F. Skipworth, Percy R. Kelly, George W. Stapleton, J. U. Campbell, Gilbert W. Phelps, R. R. Butler, Gustav Anderson, Dalton Biggs, J. W. Knowles, D. R. Parker, Harry H. Belt, D. V. Kuykendall, J. M. Batchelder, T. E. J. Duffy, George R. Bagley and James E. Eakin.

TENNESSEE

Tennessee Members of U. S. Supreme Court Guests of Honor at Annual Meeting—Bar Association Begins Publication of Official Organ

The forty-second annual session of the Bar Association of Tennessee will be held at the Belle Meade Country club near Nashville, on June 15 and 16, according to announcement by Walter Chandler, secretary of the organization. The guests of honor will be the Tennessee members of the Supreme Court of the United States, Justices James C. McReynolds and Edward T. Sanford.

The secretary announced that while the entire program has not been completed, it promises to be one of the best that the association ever has attempted. Addresses will be made by R. E. L. Saner, Dallas, Tex.; Dr. Schermerhorn, of Vanderbilt university; R. F. Spragins, of Jackson; John Bell Keeble, of Nashville and others.

The State Bar Association of Tennessee has begun the publication of a quarterly bulletin which declares its object to be "to arouse the interest of every attorney-at-law in Tennessee in the Bar Association and likewise in good government in our state. Being a member of the legal profession obligates the lawyer to a greater public responsibility than rests upon the layman. Membership in the State Bar Association consecrates him to service and gives him an avenue for effort." The first issue contains a message from President Thomas H. Malone of the Association.

An organized drive to bring the Association membership up to one thousand has been undertaken by the Membership Committee. Mr. W. R. Manier of Nashville, is the chairman.

NEW YORK

County Lawyers' Association Elects Officers—Committee on Professional Ethics and Grievances Answers Questions

The New York County Lawyers' Association held its annual meeting on May 3rd, 1923. The following officers were duly elected for the ensuing year: President, James A. O'Gorman; Vice-Presidents, William Nelson Cromwell, Henry W. Taft, Almet F. Jenks; Secretary, John E. O'Brien; Treasurer, Benno Lewinson.

The following were elected directors, Class of 1926: William Byrd, Lewis L. Delafield, Samuel Greenbaum, Terence J. McManus, Edgar J. Nathan, Abram J. Rose, Henry W. Sackett, Charles Strauss.

During the course of the meeting the Association dispatched a telegram to the New York Legislature urgently appealing for legislation increasing the number of Justices of the Supreme Court in the First Judicial Department. It was the sense of the Association that additional Justices are necessary to relieve the intolerable conditions due to the congestion of the calendars in that Department. On the following day, the Legislature passed a bill authorizing the election of four additional Justices.

The Committee on Professional Ethics and Grievances has answered the following questions:

Question No. 221.—In the opinion of the Committee, is it proper professional conduct for the trial counsel of one party to submit to the Judge of the Court, who is to preside at the trial, and in advance thereof and without the knowledge and consent of counsel for the adverse party, a trial brief setting forth a statement of facts, alleged by counsel to be the facts of the case, and the propositions of law alleged by him to be applicable thereto? Should not the Judge under such circumstances and under the prevailing rules of appropriate judicial conduct, refuse to receive and examine such trial brief, containing such *ex parte* presentation?

Answer No. 221.—In the opinion of the Committee, no trial brief should be submitted to, or accepted by, the Judge without the knowledge of the adverse counsel.

Question No. 222.—In the opinion of the Committee are advertisements in daily newspapers, substantially in the following form, professionally improper:

"LAWYER
.....Street, Suite .....
Consultation and Advice Gratis"

"EXPERIENCED, reliable lawyer, all matters; consultation free. .....St., Tel....."

Answer No. 222.—In the opinion of the Committee such advertising does not properly comport with the responsibility or dignity of the office which the lawyer holds. (See Canon 27 American Bar Association; Committee's Answer 45.) The failure to disclose the name of the advertiser, and the attempt to secure remunerative employment under the guise of offering free consultation and advice too readily lend themselves to imposition and fraud upon those clients who would be likely to be secured through this form of anonymous solicitation. The adoption of such form readily also affords an opportunity for those who are not authorized to practice law to pretend such authority in order to deceive those who would respond to such an advertisement.

LETTERS OF INTEREST TO THE PROFESSION

"Vanity of Dissenting Opinions"

Washington, D. C., May 18.—To the Editor: I have read with very considerable interest the letters published in the May issue of the JOURNAL which were called forth by the editorial in the May Number "Four to Five Decisions." Whether it is best to continue the present practice or to put some definite limitation on the power of the Supreme Court to declare statutes unconstitutional seems to be a question about which the opinion of the bar is divided.

But in this connection it has always seemed to me an unwise thing to make public the vote of the Supreme Court on any question. The dissenting opinion (while it sometimes contains the law of the case), serves really to weaken the force of the judgment and detracts from the standing of the Court with the people. Dissenting opinions merely afford play to the vanity of the dissenting justice. If they were done away with altogether the judgment would stand as the judgment of the Court —not as the judgment of a majority of the members of the Court. The differences of opinion of the Justices would remain private, and the respect of the nation for the result would be immensely improved.

To hear the opinion of the Supreme Court of the United States after being solemnly announced by one member of the Court immediately attacked as unsound by another member of the Court has a bad effect on lawyers and a much worse effect on layman.

Put an end to the vanity of dissenting opinions and politicians will cease demanding constitutional limitations on the power of the Court.

FREDERICK S. TYLER.

Dissent and Doubt

Thomasville, Ga., May 26.—To the Editor: Apropos the discussion of "Four to Five Decisions," doubt as to Constitutionality, etc., the case of Carmichael vs. Brown, 97 Ga. S. C. page 488 (and very likely other state court decisions), is of interest.

In that case the trial judge held that a written contract was not ambiguous and refused to allow oral testimony to explain same. One of the Supreme Court judges agreed with the trial judge that the contract was free from ambiguity but interpreted it altogether differently. The majority of the Supreme Court held:

> We think the language in question is ambiguous and can not be correctly construed by the court without the aid of extraneous evidence to explain its real meaning as understood by the parties; and we are the more impressed with this by the fact that such widely different constructions are placed upon it by our brother Atkinson and the learned judge below.

I would like to know if other courts have expressed themselves upon the issue.

W. IRWIN MACINTYRE.

"Four to Five Decisions"

Boston, Mass., May 22.—To the Editor: I have read with great interest your two editorials on the Four to Five decisions, and the letters written thereon. In the first place, I think we may take it for granted that unless the Supreme Court stops declaring laws unconstitutional by decisions of four to five, a tremendous effort will be made to curtail the powers of the Court in this regard.

Secondarily it would appear from the various citations of the court's own decisions that a law should not be declared unconstitutional unless it is so beyond reasonable doubt. Now, on the face of it any case that splits the Supreme Court five to four, is by no means an open or shut one, for or against the constitutionality of the law, and as such, according to the Supreme Court's own rulings, the statute should be given the benefit of the doubt. I am not saying that the dissenting members may not be absolutely certain in their own minds that their view is the right one, and that the same may not hold true of the majority members, but looking at it from the outside, and presupposing equal ability on both sides of the fence, it is fairly obvious that the case must be a doubtful one if men of equal ability reach different conclusions. It would seem advisable in all cases where the Court is split five to four, or six to three, to have the case reargued, and if after the re-argument, the judges all feel the same way, and the minority cannot be argued into agreeing with the majority, then the majority should not under their own ruling pronounce the statute unconstitutional. It would also seem wise that in the case of seven to two decisions, the minority should not vote at all, and let the decision be made by the majority vote.

I think the make-up of the Court has something to do with these decisions. If you get an extraordinarily forceful personality, such as Chief Justice Marshall was, for Chief Justice, he will always more or less by sheer force of personality bring the rest of the Court to his point of view. Also the members of the Court should be very careful never to dissent on anything but a major question involved, and not base their dissent on some minor or technical point, and also, the dissenting judges should not be in a too unyielding frame of mind. They should be in the position of wishing to coincide with the opinion of the majority if they can do so with any sort of a clear conscience.

It should always be borne in mind that it is of vital importance that the Supreme Court retain the confidence of the people at large, and that for this reason, it is advisable that their opinion should be always, if possible, unanimous, and this fact should be borne in mind by the judges in giving their opinions.

I don't know what the custom is in the Supreme Court, but it would seem that the proper way to handle all these very doubtful cases would be a round table discussion between the judges to see if it were not possible to come to a unanimous verdict, each member bearing in mind the fact that the other members of the Court were fully as likely to reason clearly as himself.

Also the President in making the appointments to the Supreme Court should if possible not appoint men who have what might be called a "dissenting habit of mind," but men who have what might be called "assenting minds." ELLERTON JAMES.

Stock Without Par Value

New York, March 21.—To the Editor: On page 125 of your February issue you stated that the State Bar Association of Connecticut had recommended "legislation prohibiting the issue of stock without par value."

In answer to my inquiry, Mr. Lucius F. Robinson of Hartford, vice-president of the Association, has

written me that the recommendation was in favor of the legislation.

It is probable that through copy reading or proof reading the word "permitting" has been changed to "prohibiting."

As I am interested in the further extension of this type of legislation I hope that you will be able in a later issue to call attention to this error.

HEDLEY V. COOKE.

Hay Fever and Annual Meetings

Somerset, Ky., April 21.—To the Editor: The writer, a member of the American Bar Association, has a personal grievance against the officers of the association about which I desire to complain and at the same time I am no doubt expressing the sentiment of many hundreds of other members of the American Bar Association.

The writer is, and has been for many years a victim of Hay Fever and no doubt there are many other members of the American Bar Association who are likewise afflicted. We would like to attend the conventions each year but you know we commence sneezing regularly on August 15th, and continue thereafter at all times until frost. We are therefore unable to travel for pleasure during the season and invariably the conventions are all held some time during the latter part of August, after the season opens and before frost. Now why not give our Hay Fever association consideration in the future and hold at least an occasional convention before the middle of August or at some place around the Great Lakes where we will not be afflicted.

The writer has had this personal matter in mind for several years, and certainly hopes that our other victims will be of sufficient number to get an occasional convention, other than during the season.

BEN V. SMITH.

To Impress Sanctity of Oath

Louisville, Ky., March 23.—To the Editor: Miss Susan A. Fleming, Librarian of the Louisville Law Library, recently served upon a jury. It seemed to her that both the witnesses and jurors took the oath required of them in too perfunctory and casual a manner. She made the suggestion that the witness, instead of simply holding up his hand and hearing the clerk repeat a form of words, should himself say: "Yes, I will testify to the truth," and that the jurors should each say: "Yes, I will, with God's help, decide justly between the plaintiff and the defendant," or say something that would bring the matter of their oath more closely to their minds and consciences.

It would take a little time, but the idea seems to me a good one. W. W. THUM.

Back to the Constitution

New Bern, N. C., May 14.—To the Editor: A recent issue of the Washington Post contains an interesting editorial entitled "A Treaty Making Plan," commenting upon Mr. Frank A. Vanderlip's suggestion to take the treaty making power from the President and Senate and lodge it in a "Council of Foreign Relations."

This would change a basic and vital principle of our Constitution and government. The amendments to the Constitution adopted in the manner therein prescribed, such as the Income Tax, Direct Election of Senators, Prohibition and Suffrage for Women, were political amendments, change methods of government and relate to the public welfare, but to add another branch to our system of government strikes at the fundamental principle upon which it was established by the Fathers of the Republic in 1787, when the Federal Constitution was adopted. "The American system of government is an elaborate system of checks and balances," says Judge Cooley, in his "Principles of Constitutional Law."

These checks and balances were enumerated by John Adams and were stated by Judge Cooley in a chapter of his book above mentioned, entitled "Checks and Balances in Government," as follows:

> First: The States are balanced against the general government: Second: The House of Representatives is balanced against the Senate, and the Senate against the House: Third: The executive authority is, in some degree, balanced against the Legislature: Fourth: The Judiciary is balanced against the Legislature, the Executive and the State governments: Fifth: The Senate is balanced against the President, in all appointments to office, and in all treaties: Sixth: The people hold in their own hands the balance against their own representatives by periodical elections.

In the Convention which framed the Federal Constitution instead of a privy council, the Senate was vested with control over the acts of the Executive in negotiating treaties. (Bancroft's History, U. S. Constitution, Vol. 2, P. 190.)

The *President negotiates treaties only*, the *Senate ratifies them*. I hope we may never destroy this system of checks and balances by any Supersenate or Supergovernment at home or abroad, such as a Council of Foreign Relations would become.

The oft quoted grand old man, Gladstone, truly said: "The American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man."

The division of our Government into legislative, executive and judicial departments, both in the Federal Constitution and in the home government of every one of the American States was conceived by our early American Statesmen from their experience and deep research, and it was established with a rigid consistency beyond even the example of Great Britain, where one branch of the legislature, the House of Commons, still remains supreme, though elected by the people.

Each and every one of the three departments of our American representative system proceeds from the people; each is a check upon the other; and "each is endowed with all the authority needed for its just activity," says Bancroft. This threefold division of the powers of government is absolutely essential to the success of a federal republic. This was the opinion of Madison, John Adams and all the great builders of the Constitution. We may add to, or take from, our Constitution in those matters relating to details of government to meet changed conditions of national life, but let us not strike at the root, or basic, vital, fundamental principle of our representative government. We have at the present time too many suggestions to make fundamental changes in the Constitution; instead of getting away from the Constitution we want to get back to it. The United States Senate is a mighty bulwark and defence of representative government. The American system is by, for and of the people—may it be perpetual! CHARLES R. THOMAS.

Necrology

Judge Ralph S. Ambler, prominent lawyer of Canton, Ohio, and a well-known member of the American Bar Association, died of heart failure on April 30. He served two terms on the Common Pleas bench and on retiring became associated with Senator Atlee Pomerene, a connection which continued until his death. Judge Ambler was president of the Canton Chamber of Commerce in 1920 and 1921. He took particular interest in the organizations of the profession. The Stark County bar adopted resolutions expressive of his service to the profession and the community.

Harry B. Bradbury of Brooklyn, New York, well known lawyer, and author of a number of works on legal subjects, died at his home in that city on May 16. He had practiced thirty years in Brooklyn and was considered an expert on insurance law and trial work. Mr. Bradbury was a member of the family of that name that came from Yorkshire, England, in 1636, and both his paternal and maternal great-grandfathers fought in the Revolution.

Luther Z. Rosser, of Atlanta, Georgia, one of the leading lawyers of the state, died recently. He had practiced law for forty years in Atlanta and had been engaged as counsel in a number of notable cases. He served as president both of the local and state bar Associations, and at the Cincinnati meeting of the American Bar Association delivered an interesting address. In the course of a notable tribute to him the Atlanta Journal of March 14 says, "A figure more virile never crossed his city's stage, nor one more picturesque."

Judge Solon L. Perrin, of the Superior and Juvenile Courts at Superior, Wisconsin, died on February 7 in that city, after an illness of several months. Judge Perrin was graduated at the University of Wisconsin in 1881 and at once entered the practice of law. He served for some years as general counsel of the Chicago, Minneapolis and Omaha Railroad. In 1896 he left St. Paul and formed a partnership at Superior. In 1918 he was appointed judge of the Superior and Juvenile Courts to fill an unexpired term and last fall he was elected judge for a six-year term beginning January 1, 1923. Judge Perrin had made a careful study of juvenile delinquency and had addressed many meetings on that subject.

William Wirt Gurley, general counsel for the Chicago Surface Lines since 1914, died recently at the age of 72. He had practiced law in Chicago since 1874, from the first making a study of corporation finance. Mr. Gurley was born in Mt. Gilead, Ohio, on January 27, 1851, and educated at Ohio Wesleyan University.

Judge R. H. Sansom, of Knoxville, Tennessee, died on February 16 at the age of 68. During more than forty years he was one of the leading lawyers of East Tennessee. He was elected to the Civil Court of Appeals in 1918 by a large majority and discharged the duties of his position with credit. Judge Sansom was born at Georgetown, Texas, received his early education in Nashville, Tennessee, and soon after began practice at Columbia. In 1881 he removed to Knoxville, where he achieved an enviable position in the professional, business, social and religious life of the city.

J. M. Stayton, of Newport, Arkansas, recently died at his home following an operation. He was a graduate of Arkansas College at Batesville and Vanderbilt University of Nashville. He was identified with some of the principal litigation in his state, and was president of the Arkansas Bar Association for one year.

Judge Donald L. Morrill, of the Illinois Appellate Court, died on March 24 at his home in Chicago. Judge Morrill had practiced law in Chicago for more than 30 years prior to his elevation to the bench in 1920. He was attorney for the Board of Education of Chicago from 1891 to 1898 and president of that organization for one year. He was born in Maine and received his education at Brown University. At the time of his election as judge he was member of the State Board of Law Examiners and president of the Chicago Law Institute. He was the author of a number of legal works.

Ferdinand Richard Minrath, of New York City, died on April 21 at the age of 65. Mr. Minrath was born in New York, receiving his literary education at the College of the City of New York and his law degree from the Columbia Law School. The following year he began to practice and for forty-two years remained a member of the same firm.

Robert W. Blair, general attorney for the Union Pacific Railroad, died of heart failure at Topeka, Kansas, on April 12. He had been associated with the Union Pacific Law Department since 1887. Mr. Blair was graduated from the University of Kansas in 1887, was law clerk for the Union Pacific for one year and then became assistant attorney. About fifteen years ago he succeeded N. H. Loomis as general attorney. He was born in Bucks County, Pennsylvania, and came with his parents to Kansas in the late seventies.

Macgrane Coxe, widely known as an authority on the law of bankruptcy, died recently in New York. He was born in Huntville, Alabama, was graduated from Yale University, and in 1881 began the practice of law in New York City, serving as Assistant United States Attorney and United States Commissioner for the Southern District of New York. In 1896 and 1897 he was Minister to Honduras and Guatamala. He lectured many years at Yale on the law of bankruptcy.

Judge Samuel Cecil Graham, of Tazewell, Virginia, died at his winter home near City Point, Florida, on January 11. Judge Graham enlisted in the Confederate Army at the age of 17 and was wounded three times in action. At the end of the war he studied law and was elected county judge at the age of 26. After six years on the bench he refused re-election, to devote himself to the practice of law. Judge Graham took great interest in the organization of the profession and served as president of the Virginia State Bar Association in 1903.

Judge Luke D. Stapleton, of Brooklyn, died on February 12. For nearly ten years he was a Justice of the Supreme Court of New York and previous to that he had served as First Assistant Corporation Counsel of New York and, later, as trial counsel for the Metropolitan Street Railway Company and the Long Island Railway Company. Governor Hughes appointed him to the Supreme Court bench to fill an unexpired term, a position to which he was elected for a full term without opposition. Judge Stapleton resigned in 1917 to return to the practice of law. He was president of the Brooklyn Bar Association in 1922.

Daniel Whitford, of Far Rockaway, N. Y., died on May 16 at the age of 82. He practiced for many years in New York and was active up to a short time before his death. Mr. Whitford was counsel for Gen. Ulysses S. Grant at one time, and also for the late Mark Twain and other prominent citizens of New York. He took a great interest in church work and was Vice-Chancellor of the Episcopal Diocese of Long Island.

Joseph Brewster, of New York, died on May 2. He was graduated from New York Law School and admitted to the bar in 1894. He was a member by inheritance of the New York Commandery of the Military Order of the Loyal Legion, a life member of the New York Law Institute, and a member of the city, county, state and American Bar Associations.

Judge Pryor Hand, former Chief Justice of the Supreme Court of Illinois, died recently at Long Beach, California, where he had made his home for two years. Judge Hand was on the County bench of Henry County, Illinois, for six years, beginning in 1884, and from 1890 to 1894 was Assistant United States District Attorney for the Northern District. He served on the Supreme bench from 1900 to 1908, being Chief Justice in 1903-4 and in 1907-8.

Paul D. Durant, of Milwaukee, died suddenly on February 15. Mr. Durant was born in Montpelier, Vermont. He graduated from the University of Michigan Law Department in 1895 and was admitted to the bar in Wisconsin that year. After practicing in Wisconsin for awhile he moved to Milwaukee. He was considered an authority on taxation matters and was counsel in a number of important cases.

Judge Martin A. Knapp, of the Circuit Court of Appeals of the Fourth Judicial Circuit, died at his home in Washington on February 10. Judge Knapp was admitted to the bar in 1869 and practiced in Syracuse, New York, for many years, being counsel for a number of large financial and commercial concerns. President Harrison appointed him on the Interstate Commerce Commission in 1891 and in 1898 he was elected chairman of that body. President Taft nominated him Chief Justice for the Court of Commerce, which nomination was later confirmed by the Senate. As ex-officio mediator under the Erdman Act and later as a member of the Board of Mediation and Conciliation created by the Newlands Act of 1913, Judge Knapp participated in the negotiations for settlement of a number of important railroad-labor disputes. He received his collegiate education at Weslyan University at Middletown, Connecticut, which institution conferred the degree of L. L. D. upon him in 1892. The same year Syracuse University gave him the honorary degree of A. M.